Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DOMINO'S PIZZA, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
and DAVID PAPA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should clarify the standard for imposing liability on employers for sexual harassment by supervisory employees, where there is substantial conflict among the circuits about the correct standard to apply in light of *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63 (1986).

2. Whether Title VII permits a district court to order sweeping injunctive relief against an employer where the court found that a single employee at one location had been subjected to harassment by a single low-level supervisory employee roughly seven years earlier.

PARTIES TO THE PROCEEDING

Neither Domino's Pizza, Inc. nor any of its affiliated companies are publicly traded. Domino's Pizza, Inc. is wholly owned by TISM, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Domino's Pizza, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is unreported. The opinion of the District Court (App. B) is reported at 909 F. Supp. 1529 (M.D. Fla. 1995).

JURISDICTION

The Court of Appeals for the Eleventh Circuit summarily affirmed the judgment of the District Court on April 17, 1997. The Eleventh Circuit denied a timely Suggestion of Rehearing En Banc on July 3, 1997. (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1) (1988)[1] provides in relevant part:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-3(a) (1988) provides in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

42 U.S.C. § 2000e-5(g) (1988) provides in relevant part:

> (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders
>
> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back

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[1] The District Court applied the pre-1991 version of Title VII in this case, because the pertinent events occurred in 1988. App. B at 13a, n.3. The 1991 Amendments, however, did not affect the substance of the Title VII provisions in question here.

> pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.
> . . .

STATEMENT OF THE CASE

The fundamental question presented by this Petition is one that has been presented to courts with increasing frequency in recent years, and has resulted in confusion and conflict in the case law: What is the proper standard for evaluating employer liability for sexual harassment by a supervisory employee? A related issue concerns the propriety of imposing broad, sweeping injunctive relief against a company based on a finding that a single employee at one of the company's hundreds of locations nationwide had been subjected to sexual harassment by a low-level supervisor approximately seven years earlier.

1. Factual Background.

This case involves allegations that David Papa, while employed by Petitioner Domino's Pizza, Inc. ("Domino's"), was sexually harassed and retaliated against by his immediate supervisor, Beth Carrier. At the time the events in question occurred, Papa worked as store manager at Domino's Port Richey, Florida location, and Carrier was a Corporate Area Supervisor. App. B at 4a.

According to the findings of the District Court, between January and May of 1988, Carrier engaged in various instances of inappropriate conduct towards Papa. These incidents included touching Papa, making several comments with sexual connotations, including comments about Papa's body, and expressing caring and affection for Papa. *See id.* at 4a-5a. On one occasion, during a conversation about where Papa and his young son, David, would live, Carrier expressed her caring for Papa, and offered to let Papa and his son come live with her. Papa responded by ordering Carrier to leave his office and threatening to report Carrier's conduct to her supervisor.

The District Court found that, when Carrier left the store, she made a comment to the effect that she would "get" Papa. *Id.* at 5a.

Approximately a week after Papa's last encounter with Carrier, she and her supervisor, Mike Haskins, came to the store and informed Papa that he was being fired for violating company policy, including manipulating company paperwork. *Id.* at 5a-6a. The District Court credited testimony to the effect that Carrier had been involved in or had approved the manipulation of paperwork, and that Papa did not know these actions violated company policy. *Id.* at 6a.

Papa never reported his claims of sexual harassment to Carrier's supervisors. *Id.* Indeed, the District Court expressly found that Domino's had neither actual nor constructive knowledge of Carrier's alleged activities. *Id.* at 10a.

2. The Proceedings Below.

The Equal Employment Opportunity Commission (EEOC) filed suit on August 12, 1991, alleging that Domino's violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when Carrier subjected Papa to sexual harassment. The EEOC also alleged that Papa's subsequent termination was retaliatory. On October 17, 1991, Papa was granted leave to intervene in the case.

Following a bench trial in November 1994, the District Court entered judgment in favor of the EEOC and Papa, finding Domino's liable for hostile environment harassment, quid pro quo harassment and retaliation. The Court held that Domino's was not "indirectly" liable for Carrier's harassment via respondeat superior because, in order to establish such liability, the plaintiff would have to show that the employer knew or should have known of the harassment, and failed to take remedial action. *Id.*

at 9a-10a. Because Papa never made a report of harassment to anyone at Domino's, and no one from management was present to observe Carrier's conduct, Domino's had neither actual nor constructive knowledge of the hostile environment created by Carrier. *Id.* at 10a. The Court concluded that Domino's was nevertheless "directly" liable for Carrier's conduct on the ground that, "where the harasser is the employer or an agent of the employer, the employer is directly liable." *Id.* The Court noted that the Eleventh Circuit had previously adopted the EEOC's view that a supervisor acts as an "agent" of the employer when the supervisor uses the authority delegated to him to make or threaten to make decisions affecting the employment status of his subordinates. Domino's was therefore directly liable because, when Carrier fired Papa, she was exercising the authority delegated to her by Domino's. *Id.*

With regard to the allegation of quid pro quo harassment, the Court noted that acceptance or rejection of harassment by an employee must be an express or implied condition for receiving a job benefit or must be the cause of a tangible job detriment in order to create liability under this theory. *Id.* at 11a. The Court then relied on the same facts—Papa's negative reaction when Carrier expressed her caring and offered to let Papa and his son come live with her, coupled with his subsequent termination—as a basis for finding quid pro quo harassment. *Id.* The Court also relied on these facts to find retaliation. *Id.* at 12a. The District Court awarded Papa $237,257.52 as well as attorneys' fees.[2] *Id.* at 16a; App. D. In addition, the Court permanently enjoined Domino's "from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment and or [sic] which discriminates

[2] Papa ultimately recovered $34,641.49 as a separate attorneys' fees award. If the present Petition is granted and the judgment is vacated, Domino's requests that the award of attorneys' fees also be vacated.

against employees who oppose what the employee believes to be a discriminatory employment decision." *Id.* at 16a-17a. The Court also directed Domino's "to post a written sexual harassment and retaliation policy in each of its stores for a period of at least two years from the date of this judgment." *Id.* at 17a. Domino's was further directed "to conduct yearly training of each of its managers, including store managers, regarding [Domino's] sexual harassment and retaliation policy for a period of two years from the date of this judgment." *Id.*

Domino's filed a timely appeal and, on April 17, 1997, the Eleventh Circuit summarily affirmed the District Court's judgment. App. A. Domino's then filed its timely Suggestion of Rehearing En Banc, which the Eleventh Circuit denied on July 3, 1997. App. C.

REASONS FOR GRANTING THE PETITION

I. THE PETITION SHOULD BE GRANTED TO RESOLVE EXISTING CONFLICT AND CONFUSION AMONG THE CIRCUITS ABOUT THE CORRECT STANDARD TO APPLY IN DETERMINING WHEN AN EMPLOYER SHOULD BE HELD LIABLE FOR SEXUAL HARASSMENT BY A SUPERVISOR.

This case presents difficult and important questions about the law governing an employer's liability for sexual harassment by supervisory employees. Since this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63 (1986), courts have struggled to forge proper standards for evaluating employer liability, and in the process, have reached confusing and conflicting results. In some instances, including the present case, courts have applied standards that essentially conflate the theories of quid pro quo harassment and hostile work environment harassment, and blur the distinction between these types of harassment and retaliation claims. This Court should grant Domino's Petition for a Writ of Certiorari to resolve the conflict among the circuits and bring order to the chaotic case law on this important and frequently litigated issue.

In *Meritor*, this Court declined to announce any definitive rule on employer liability, stating only that courts should look to agency principles for guidance. 477 U.S. at 72. Beyond that general instruction, the Court pointed out that, when Congress defined "employer" in Title VII to include any "agent" of an employer, it was surely evincing an intent to place some limits on the acts of employees for which employers are to be held liable. *Id.* Citing generally to the RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958) ("the RESTATEMENT"), the Court held that it was error to conclude either that employers are automatically liable for sexual harassment by their supervisors or that an employer will necessarily be insulated by lack of notice of the harassment. *Meritor*, 477 U.S. at 72. There was no ruling or suggestion that Title VII incorporates the RESTATEMENT; in fact, the Court cautioned that "common-law [agency] principles may not be transferable in all their particulars to Title VII." *Id.*

In the decade following *Meritor*, courts have largely failed to heed this warning. Instead, they have attempted simply to apply traditional agency principles as set forth in the RESTATEMENT—a text drafted some forty years ago with very different kinds of problems in mind—as a framework for evaluating liability in the harassment context. The result has often been awkward and opaque formulations of liability rules, as well as confusion and conflict in the case law. As Chief Judge Posner of the Seventh Circuit recently stated,

> by citing the Restatement, [the Supreme Court] gave lawyers and judges a straw to grasp at. The straw has broken in their hand. The Restatement turns out to be hopelessly vague in its bearing on the issue of employer liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the Restatement to employers' liability for sexual harassment by supervisory employees. *See, e.g., Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc).

Jansen v. Packaging Corporation of America; Ellerth v. Burlington Industries, —— F.3d ——, Nos. 95-3128, 96-1361, slip op. at 19 (7th Cir. August 12, 1997) (en banc) (Posner, C.J., concurring and dissenting).[3]

Faragher, cited by Chief Judge Posner as an example of the confusion that exists despite the good faith efforts of judges, is an en banc decision of the Eleventh Circuit addressing circumstances in which an employer may be held liable for supervisor-created sexual harassment. It was handed down at virtually the same time as the panel decision summarily affirming the District Court in the present case. Yet the District Court's analysis, effectively adopted by the panel's summary affirmance, is inconsistent with *Faragher*. The District Court's opinion is also an excellent example of the analytical distortion that can result when courts simply engraft traditional agency principles onto Title VII/harassment law, and broadly apply them.

As noted above, in analyzing the issue of Domino's liability for the hostile environment harassment of store manager David Papa by a low-level supervisor, Beth Carrier, the District Court noted that an employer may be held "indirectly" liable via respondeat superior if the plaintiff can establish that the employer knew or should have known of the harassment, and failed to take remedial action. Because Domino's had neither actual nor constructive knowledge of the atmosphere created by Carrier, the Court concluded that Domino's could not be held "indirectly" liable. App. B at 9a-10a.

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[3] The Seventh Circuit's recent decision in *Jansen* is an excellent illustration of the confusion and dissension that exist on the issue of employer liability, not only between circuits but within circuits. The en banc Court was unable to forge a majority position regarding the proper standard for evaluating an employer's liability for sexual harassment by a supervisor. Eight judges wrote separately to express their views on various aspects of the issues presented.

Alternatively, the District Court stated, where the harasser is the employer or an agent of the employer, the employer is "directly" liable. App. B at 10a. The District Court noted that the Eleventh Circuit had adopted the EEOC's view that a " 'supervisor acts as an "agent" of the employer . . . where [the] supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates.' " *Id.* (quoting *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558-59 (11th Cir. 1989)).[4] In an overly expansive and attenuated application of this principle, the District Court concluded that Domino's was therefore "directly" liable for Carrier's hostile environment harassment, because Carrier was exercising the authority delegated to her as an agent of Domino's when she was involved in the subsequent firing of Papa. App. B at 10a.

In *Faragher*, the Eleventh Circuit reformulated its standard for liability for claims of hostile environment sexual harassment. The en banc Court explained that an employer is *directly* liable for hostile environment sexual harassment if it knew or should have known of the harassment and failed to take immediate and appropriate remedial action. Under this theory, the employer "can be held liable for its own negligence or recklessness, but not for the conduct of it supervisors or employees." *Faragher*, 111 F.3d at 1535. In contrast, employers may generally be held *indirectly* liable for hostile environment harassment by a supervisor under two agency principles: (1) where the harasser is acting within the scope of his or her employment in perpetrating the harassment; and (2) where the harasser is acting outside the scope of his or her employment, "but is aided in accomplishing the harassment by the existence of the agency relationship."

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[4] The language in *Sparks* on which the District Court relied is a quote from *Meritor*, in which this Court stated, without ruling upon, one portion of the EEOC's position on liability issues as set forth in its amicus brief. *Meritor*, 477 U.S. at 70-72.

Id. at 1536 (citing RESTATEMENT (SECOND) OF AGENCY § 219(1) and (2)).[5]

Addressing the first agency principle, the Eleventh Circuit stated that harassing conduct is typically outside the scope of the supervisor's employment, because the supervisor generally does not intend to perform any service for his employer, but acts from purely personal motives to further some personal end. *Id.* at 1535-36. As for the second agency principle, the Court observed that, in a sense, a supervisor is always aided in accomplishing hostile environment harassment by virtue of his agency relationship with the employer because of his role and responsibilities as a supervisor. The Court cautioned, however, that the term "aided" should not be used in such a broad sense. "Rather, the employer is liable only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with agency status," as, for example, where the harasser repeatedly reminds the victim he can fire her if she refuses his advances. *Id.* at 1537.

The Eleventh Circuit's evolving formulation of a liability standard raises several significant issues. First, it conflicts with the standards applied in other circuits. Second, it obscures any meaningful distinction between

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[5] The RESTATEMENT (SECOND) OF AGENCY § 219 provides:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment;

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) The master intended the conduct or the consequences, or

(b) The master was negligent or reckless, or

(c) The conduct violated a non-delegable duty of the master, or

(d) The servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

hostile environment harassment and quid pro quo harassment. And third, it illustrates how the broad and conclusory application of generic agency principles—which were certainly *not* drafted with sexual harassment in mind —can result in an inappropriate and dangerously expansive analysis of harassment claims.

A. Conflicting Standards for Imposing Liability.

The Eleventh Circuit's formulation in *Faragher* of a standard for imposing liability for hostile environment harassment by a supervisor is not only vague and confusing, it is inconsistent with standards applied in other circuits. As the Second Circuit recently understated, "[r]elying on the imperfect analogy to agency law, and specifically on the Restatement of Agency, courts have had difficulty establishing coherent rules in this area." *Torres v. Pisano*, 116 F.3d 625, 633 (2d Cir. 1997).

For example, in contrast with the Eleventh Circuit's more complex formulation, several circuits apply a straightforward negligence standard. *See, e.g., Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997) (in cases alleging hostile environment sexual harassment by a supervisor, the employer is liable only if it knew or should have known of the hostile environment); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (an employer is liable for a sexually hostile work environment created by a supervisor or other employee only if the employer knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994) (the proper analysis for employer liability in hostile environment cases is what management-level employees knew or should have known, not whether an employee was acting within the scope of his employment). Indeed, one of the few issues a majority of the Seventh Circuit was able to agree upon in *Jansen* was that negligence is the only proper standard of employer liability in cases of hostile environment sexual

harassment, whether the harasser is a supervisor or a co-worker. *Jansen*, —— F.3d ——, slip op. at 2 (per curiam opinion).

Other circuits include negligence as one basis for liability, but, like the Eleventh Circuit, also incorporate various other agency principles into their liability formulations. Thus, the Tenth Circuit, in *Harrison v. Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), adopted a broad view of § 219 of the RESTATEMENT, holding that an employer can be held liable for hostile environment harassment by one of its supervisors if (1) the supervisor committed the harassment while acting in the scope of his employment; (2) the employer knew or should have known of the harassment and failed to respond appropriately; (3) the employer manifested in the supervisor the authority to act on its behalf, and such manifestation resulted in harm to the plaintiff, who acted or relied on the apparent authority; or (4) the employer delegated to the supervisor the authority to control plaintiff's work environment and the supervisor abused that delegated authority by using it to aid or facilitate in perpetrating the harassment. *Id.* at 1446.

The Third Circuit also combines a negligence standard with other agency principles, recognizing three potential bases under § 219 of the RESTATEMENT for imposing liability on employers: (1) for torts committed by employees within the scope of their employment; (2) for the employer's own negligence in failing to take action upon notice of harassment; and (3) where the harassing employee relied upon apparent authority or was aided by the existence of the agency relationship. *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106-08 (3d Cir. 1996). According to the Third Circuit, scope-of-employment liability does not apply in the hostile environment context because, unlike the quid pro quo case, "the harasser is not explicitly raising the mantle of authority to cloak the plaintiff in an unwelcome atmosphere." *Id.* at 106-07. Supervisors can be "aided" by the existence

of the agency relationship by having power or "apparent authority" over the victim. In this regard, however, the Third Circuit in *Bouton* included a significant caveat: the harassed employee must have a reasonable belief that the supervisor is authorized in his actions before the employer is bound, and such a belief is unreasonable if the employer has a remedial sexual harassment policy that is known to the employee. *See id.* at 108-110.

The D.C. Circuit's liability standard adopts a narrow view of the principles in § 219(2), and similarly incorporates a "reasonableness" requirement. In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 569 (1995), the Court stated that

> an employer may not be held liable for a supervisor's hostile work environment harassment if it is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct . . . While a supervisor might purport to act or speak on behalf of the employer, there can be no liability if the victim could not reasonably rely on the supervisor's representations.

Id. at 1398.

The Sixth Circuit, unlike the Fourth, Seventh and Eighth Circuits, applies the negligence (*i.e.*, knew-or-should-have-known) standard only in cases of co-worker hostile environment harassment. In determining whether an employer should be held liable for hostile environment harassment by a supervisor, the Sixth Circuit considers (1) whether the supervisor's harassing actions were foreseeable or fell within the scope of his employment, and (2) even if they were, whether the employer responded adequately and effectively to negate liability. *Kauffman v. Allied Signal, Inc., Autolite Division*, 970 F.3d 178, 183 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992). In determining whether the acts complained of occurred

within the scope of the agent's employment, the Sixth Circuit has stated that courts must examine such factors as when and where the act took place, and whether it was foreseeable. *Id. But see Andrade*, 88 F.3d at 261 ("Our precedent rests on the presumption that illegal sexual activity is an illegitimate corporate activity, beyond the scope of supervisors' employment."); *Harrison*, 112 F.3d at 1444 (scope-of-employment liability rarely applicable in hostile environment context because sexual harassment is simply not within the job description of any supervisor or any other worker in any reputable business.

The Second Circuit not only distinguishes between co-worker harassment and supervisor harassment, but between harassment by high-level supervisors and harassment by low-level supervisors. Citing § 219 of the RESTATEMENT, the Second Circuit has held that an employer will be liable for hostile environment harassment by a supervisor when the supervisor uses his actual or apparent authority to further the harassment, or is aided in accomplishing the harassment by the existence of the agency relationship. If the supervisor in question is sufficiently high in the employer's hierarchy, his actions will necessarily be imputed to the employer. If the harassment is by a low-level supervisor who does not rely on his supervisory authority to carry out the harassment, a negligence standard applies, *i.e.*, the employer will not be liable unless it provided no reasonable avenue for complaint or knew of the harassment and did nothing about it. *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994).

These various formulations cast more doubt than light on the issue, and raise as many questions as they answer. The agency principles as incorporated by a number of courts result in rules that are murky at best. When is hostile environment harassment really "accomplished" by an "instrumentality of agency"? What distinctions should

be made for liability purposes depending solely on whether the harasser is a co-worker, a low-level supervisor or a high-level supervisor? Should liability depend upon whether the harassed employee could reasonably have believed the harassing supervisor was exercising apparent authority? Is the "essential question" for agency purposes whether the supervisor was "acting within the scope of his employment," as the Sixth Circuit had suggested? Or is the proper analysis, as the Ninth Circuit indicates, not "scope of employment," but whether management knew or should have known of the harassment? Is a supervisor ever acting within the scope of his employment when he illegally harasses an employee? Is the knew-or-should-have-known standard inapplicable when the harasser is a supervisor, as the Sixth Circuit has indicated? Or is it the essential inquiry, as the Fourth, Seventh, Eighth and Ninth Circuits have indicated?

This Court should grant Domino's Petition to resolve these and other questions presented by the inconsistent case law, and bring order and clarity to the law on this important issue.

B. The Circuit Courts Have Obscured the Distinction Between Quid Pro Quo and Hostile Environment Harassment.

As noted above, several circuits—including the Eleventh Circuit—have adopted liability standards that impose liability on employers when supervisors use actual or apparent authority to aid in accomplishing hostile environment harassment. In the present case, for example, the District Court imposed liability on Domino's for Carrier's hostile environment harassment based on the proposition that a supervisor acts as the employer's "agent" when the supervisor exercises authority actually delegated to him to make or threaten to make decisions affecting his subordinates' employment status. App. B at 10a. Under the liability standard as it evolved in *Faragher*, an employer will be held "indirectly" liable if a supervisor is "aided in

accomplishing [hostile environment] harassment by the existence of the agency relationship." 111 F.3d at 1536. *See also Harrison,* 112 F.3d at 1446; *Karibian,* 14 F.3d at 780.

These standards tend, however, to obscure any meaningful distinction between hostile environment harassment and quid pro quo harassment. As a practical matter, it is, of course, the role and function of supervisors to exercise the authority delegated to them to manage subordinates. This often includes making decisions that affect subordinates' employment status in some way. Thus, it may be the case that a supervisor has engaged in hostile environment harassment toward a particular employee, and that same supervisor has also, in the course of properly carrying out his duties and responsibilities, been called upon to make decisions that adversely affect the harassed employee. That does not mean the two actions are necessarily connected; the employment decision may in no way be conditioned on or related to the harassment.

Supervisory status becomes relevant for liability purposes when there is a link between the supervisor's use of his delegated authority and the extortion of sexual favors. As the Second Circuit pointed out in *Torres*—and as the Eleventh Circuit acknowledged in *Faragher*—supervisors are, in a sense, always aided in accomplishing harassment by the existence of the agency because their responsibilities provide proximity to and contact with the harassed employee:

> But that proves too much, and would allow the exception to swallow the rule. . . . It is likewise the case that the supervisor is always aided by the employment relationship because the employee will fear the repercussions that might result from her complaining or resisting. But this exception too, if applied in the absence of specific evidence that the supervisor used his authority to place the employee in a position in which she felt she could not complain without facing adverse consequences, would

> swallow the rule . . . . Thus, in order to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff "must allege facts which establish a nexus between the supervisory authority" and the harassment.

Torres, 116 F.3d at 635 (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2d Cir. 1995)).

The existence of this type of nexus, however, is the essence of quid pro quo harassment, not hostile environment harassment. When a supervisor uses his position explicitly or implicitly to condition the receipt of job benefits or threaten a job detriment based on the subordinate's response to requests for sexual favors, such improper wielding of the authority delegated to him is the gravamen of a quid pro quo claim. *See Karibian*, 14 F.3d at 777; *Harrison*, 112 F.3d at 1443. *See also Nichols*, 42 F.3d at 509 (the essence of the quid pro quo theory of harassment is that a supervisor relies upon his actual or apparent authority to extort sexual consideration from an employee) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982)).

This Court distinguished quid pro quo and hostile environment harassment as separate and distinct forms of discrimination in *Meritor*, with the implication, certainly, that they should be treated differently. Since *Meritor*, courts have generally held employers strictly liable for quid pro quo harassment. *See, e.g., Davis*, 115 F.3d at 1367; *Harrison*, 112 F.3d at 1443; *Nichols*, 42 F.3d at 513-14; *Bouton*, 29 F.3d at 106-07; *Karibian*, 14 F.3d at 777.[6] As this Court pointed out in *Meritor*, however,

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[6] Some conflict among the circuits exists even on this issue. Several courts have concluded that it takes more than a mere threat to impose quid pro quo liability on an employer. Rather, the plaintiff must show that he or she actually was denied a job benefit or suffered a job detriment as a result of failing to submit to sexual advances. *See, e.g,. Gary v. Long*, 59 F.3d at 1396 ("it takes more than saber rattling alone to impose quid pro quo liability on an

employers are not always liable for hostile environment harassment by supervisors. 477 U.S. at 72.

Yet, by incorporating such broad views of agency principles into their liability standards for hostile environment harassment by supervisors, the Eleventh Circuit and several other circuits have so expanded the definition of this form of harassment that they have effectively conflated the two theories and have eliminated any meaningful distinction between hostile environment harassment and quid pro quo harassment. The result is essentially a uniform mode of analyzing all harassment claims involving a supervisor, utilizing a standard that approaches strict liability. Given the harshness of that result, it is important to keep definitions clear and narrow, so that plaintiffs meet the burden of showing that employer liability should, in fact, attach.

This Court should grant Domino's Petition and, in clarifying the proper standard for liability in the hostile environment context, should also clarify the distinctions between supervisor hostile environment harassment and quid pro quo harassment for liability purposes, so courts will have a clear, coherent basis for enforcing the law.

C. The Inappropriate and Overly-Expansive Application of Agency Principles in the Present Case.

The present case illustrates how the conclusory application of generic agency principles in the hostile environment context can result in an inappropriate and overly-expansive analysis of liability for harassment claims. As noted above, in holding Domino's liable for Carrier's

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employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances). *But see Nichols v. Frank*, 42 F.2d at 513 ("[A] supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo harassment.").

hostile environment harassment of David Papa, the District Court broadly applied general agency principles regarding the exercise of delegated authority to make or threaten to make decisions regarding a subordinate's employment status. But even under the Eleventh Circuit's expansive formulations, conduct warranting imposition of what *Faragher* refers to as "indirect" liability did not occur here.

Carrier's alleged harassment of Papa was not "accomplished by an instrumentality of the agency or through conduct associated with agency status." *Faragher,* 111 F.3d at 1537. As set forth above, the District Court credited testimony that Carrier had engaged in instances of inappropriate touching, made several sexually-related comments, and also expressed her caring and love for Papa. App. B at 4a-5a. *These were all modes of harassment easily available to a non-supervisory employee.* The trial court did not find that Carrier made any sexual demands, let alone that the conduct in question was accompanied by statements or suggestions that, if Papa did not submit to her overtures, a job detriment would occur.

Rather, the District Court's decision to impose liability on Domino's for hostile environment harassment essentially rested on one occasion when Carrier expressed her affection for Papa, following which Papa ordered her out of his office and threatened to report her conduct to her supervisor. Upon leaving the store that day, Carrier reportedly made a statement to the effect that she would "get" Papa. Approximately a week later, Papa was advised by Carrier and Mike Haskins, Carrier's direct supervisor, that he was being terminated for violations of company policy, *i.e.,* for the fraudulent manipulation of store paperwork. *Id.* at 5a. The District Court concluded that Carrier was exercising the authority delegated to her by Domino's when she was involved in Papa's termination, and that Domino's was therefore liable for her hostile environment sexual harassment of Papa. *Id.* at 10a.

As discussed above, *any* actions supervisors take in their supervisory capacity could be deemed an exercise of the authority delegated to them by the employer. But, as *Faragher* warns, that principle should not be so broadly applied. 111 F.3d at 1537. *See also Torres,* 116 F.3d at 635. Carrier did not "accomplish" the harassment in question by using her role as supervisor. The District Court's expansive application of general agency principles to impose liability on Domino's for Carrier's hostile environment harassment is unwarranted even under the standard in *Faragher.*

In formulating a framework for analyzing hostile environment claims by supervisors in *Faragher,* the Eleventh Circuit repeatedly cited to and relied upon *Sparks v. Pilot Freight Carriers, Inc.,* 830 F.2d 1554 (11th Cir. 1987), a case involving allegations of both hostile environment harassment and quid pro quo harassment. *Faragher,* 111 F.3d at 1536-37. Among other things, *Sparks* is cited to describe an example of a supervisor engaging in hostile environment harassment by using "the authority delegated to him to assist in the harassment: He repeatedly reminded the victim that he could fire her if she refused his advances." *Id.* at 1537 (citing *Sparks,* 830 F.2d at 1560).

This is notable for two reasons. First, such linking of sexual favors and a threatened job detriment describes quid pro quo harassment, underscoring the Eleventh Circuit's move toward conflating the two theories. *Cf. Henson v. City of Dundee,* 682 F.2d 897, 910 (11th Cir. 1982) (in a quid pro quo case, "the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the quid pro quo."). Second, there was no finding that Carrier made any threats, conditions or demands to elicit sexual favors from Papa in the present case. Carrier never gave Papa an ultimatum—or even a strong suggestion—that he had better comply with her sexual demands or a job detriment would result. Thus, the record in the present case not only

fails to provide any reasonable basis for imputing liability to Domino's for Carrier's hostile environment harassment, it also fails to support a finding of quid pro quo harassment. *Cf. Farley v. American Cast Iron Pipe Company*, 115 F.3d 1548, 1552-1553 (11th Cir. 1997) (reciting *Faragher* standard, analyzing hostile environment claim only in terms of whether employer knew or should have known of the harassment, and finding no quid pro quo harassment because evidence did not show supervisor conditioned or demanded acquiescence to his sexual overtures in exchange for tangible job benefit).

The District Court's decision in the present case illustrates the confused state of the law on issues courts are confronting with increasing frequency: Can the requisite nexus be established in circumstances where the trier of fact makes no finding that the supervisor made explicit sexual requests or demands, and any implicit suggestions or requests were not associated with the plaintiff's job? Is quid pro quo harassment established where, as here, the only possible link was an equivocal remark Carrier supposedly made after being ordered from Papa's office, coupled with the fact that Papa was subsequently terminated? And if these facts are sufficient to establish a prima facie case of quid pro quo harassment, what is the distinction between this analysis and imposing liability on employers in hostile environment cases, where the "harassment is accomplished by an instrumentality of the agency or through conduct associated with agency status"? *Faragher*, 111 F.3d at 1537. For that matter, what meaningful distinction exists between the District Court's expansive interpretation that quid pro quo harassment was established because the plaintiff was subsequently terminated, and claims of retaliatory discharge? [7]

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[7] The District Court's analysis of the retaliation claim was similarly flawed for two reasons. First, although the District Court concluded that Carrier's motivation for *reporting* the paperwork manipulation was improper—and even that she was involved in the

Most important, the practical effect of the District Court's expansive analysis is that, in virtually every situation where there is a finding of any conduct amounting to sexual harassment by a supervisor and where subsequent adverse action is taken against the employee claiming harassment, even when the employer has no actual or constructive knowledge of the harassment, the plaintiff will be found to have established a prima facie case against the employer under all three separate and independent theories: quid pro quo harassment, hostile environment harassment and retaliation. The District Court's application of the facts to the law in the present case essentially conflates these distinct theories, and demonstrates the need for clarification of the relationship—and analytical distinctions—among them. This case presents an opportunity for the Court to provide much-needed clarification on issues of substantial importance in a growing area of the law.

II. TITLE VII SHOULD NOT BE INTERPRETED TO PERMIT A DISTRICT COURT TO ORDER SWEEPING INJUNCTIVE RELIEF AGAINST AN EMPLOYER WHERE THE EMPLOYER HAD NEITHER ACTUAL NOR CONSTRUCTIVE KNOWLEDGE OF ITS EMPLOYEE'S IMPROPER CONDUCT.

The District Court expressly found that "Domino's had neither actual nor constructive knowledge of the hostile atmosphere created by Carrier." App. B at 10a. There were no allegations or findings of a pattern or practice of

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manipulation—it is undisputed that improprieties *did* occur in paperwork for which Papa admitted he was ultimately responsible. This may mean that Carrier should also have been discharged, but it does not establish that Papa was fired for an improper reason. Second, the District Court's conclusion that Papa's "termination by Carrier" (App. B at 12a) was retaliatory completely overlooks the role of Carrier's supervisor, Mike Haskins, in the termination. App. B at 5a. Surely the actions of Haskins must be considered to be the actions of Domino's to an even greater extent than Carrier's, and there has been no suggestion that Haskins had any retaliatory motive. This issue should also be reconsidered on remand.

discrimination or retaliation. Rather, the trial court found one isolated instance of sexual harassment by one low-level supervisor directed against one employee at one of Domino's approximately seven hundred locations.

Yet, the District Court granted sweeping injunctive relief against Domino's, permanently enjoining the Company "from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment and or [sic] which discriminates against employees who oppose what the employee believes to be a discriminatory employment decision." App. B at 16a-17a. The Court also required Domino's "to post a written sexual harassment and retaliation policy in each of its stores for a period of at least two years from the date of this judgment," and "to conduct yearly training of each of its managers, including store managers, regarding [Domino's] sexual harassment and retaliation policy for a period of two years from the date of this judgment." *Id.* This sweeping relief is neither appropriate nor warranted in the context of this case.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(e)-5(g), permits courts to "order such affirmative action as may be appropriate" if a party "is intentionally engaging in an unlawful employment practice. . . ." This Court has not addressed the propriety of imposing a far-reaching injunction under this statute where, as here, the District Court has made no finding of company-wide discrimination meriting broad-based remediation. In addition, uncertainty about the permissible scope of injunctive relief exists in the lower federal courts, with courts outside the Eleventh Circuit expressing reluctance to impose sweeping injunctions in similar circumstances. *See, e.g., Spencer v. General Elec. Co.*, 894 F.2d 651, 660 (4th Cir. 1990) (affirming the denial of an injunction in a sexual harassment case, noting there was no systematic company-wide discrimination but rather an isolated incident involving one supervisor); *Kirkland v. Buffalo Board*

of Ed., 487 F. Supp. 760, 773 (W.D.N.Y. 1979) (plaintiff not entitled to an injunction placing him in position and enjoining defendant from continuing allegedly discriminatory practices because there was no proof or finding of a pattern or practice of discrimination; case was based on "an isolated violation of Title VII, § 2000e-3(a) which does not portend a recurrence."), *aff'd*, 622 F.2d 1066 (2nd Cir. 1980) (affirmed for reasons given by District Court).

The District Court's interpretation of the breadth of its equity power under Title VII is inconsistent with both the language of the statute and the general equity jurisprudence of this Court. In *Rizzo v. Goode*, 423 U.S. 362 (1976), a 42 U.S.C. § 1983 case, this Court held in part that, where responsible authorities did not play a part in unconstitutional deprivations by a few individual police officers, injunctive relief was improper. As this Court explained:

> The scope of federal equity power, it is proposed, should be extended to the fashioning of prophylactic procedures for a state agency designed to minimize . . . misconduct on the part of a handful of its employees. . . [T]his novel claim [is] quite at odds with the settled rule that in federal equity cases "the nature of the violation determines the scope of the remedy. . . ."

423 U.S. at 378 (quoting *Swann v. Charlotte-Mecklenberg Board of Ed.*, 402 U.S. 1, 16 (1971)).

As the First Circuit noted in *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1990), "[a]n injunction should be narrowly tailored to give only the relief to which plaintiff[] [is] entitled." *Id.* at 361. In *Brown*, the First Circuit vacated as overbroad an order enjoining defendant from discriminating against other putative members of plaintiff's class. "[Plaintiff's] case established that she alone had been the victim of sex discrimination. The only permissible focus of the injunc-

tive relief, therefore, would be on protecting her from further instances of sex discrimination." *Id.* In the present case, there was no finding or evidence showing that broad injunctive relief was "appropriate," or that it was necessary to prevent future violations of Title VII. *See United States v. Oregon Medical Society*, 343 U.S. 326, 333 (1952) (injunctive relief should not be considered unless the record shows "a real threat of [a] future violation [of the law] or a contemporary violation of a nature likely to continue or recur").

Despite the dearth of evidence in this case of a pattern of discrimination or retaliation, and the District Court's express finding that Domino's was unaware of this one isolated instance of wrongdoing by a low-level supervisor, the Court imposed a sweeping injunctive remedy that will impact roughly seven hundred Domino's stores across the nation. The scope of this remedy is dramatically disproportionate to the events giving rise to it.

In deciding whether injunctive relief is appropriate, "a district court must, of course, exercise its discretion in light of the prophylactic purposes of the [Civil Rights] Act . . . ." *Spencer*, 894 F.2d at 600. Here, however, no finding by the District Court supports the conclusion that injunctive relief will serve any such prophylactic purpose, or that prophylactic measures are even required.

The overbreadth of the injunction imposed on Domino's is perhaps best illustrated by its first provision: permanently enjoining Domino's "from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment and or [sic] which discriminates against employees who oppose what the employee believes to be a discriminatory employment decision." This sweeping mandate does little more than restate basic principles of federal discrimination law. Furthermore, it is wholly undeserved where, as here, the District

Court acknowledged that Domino's was completely unaware of the situation between Carrier and Papa.

The remainder of the injunction is similarly unwarranted. The trial court at once absolved Domino's from having any knowledge—actual or constructive—about the Carrier/Papa situation, while, at the same time, it punished Domino's by imposing an injunction requiring Domino's "to post a written sexual harassment and retaliation policy in each of its stores for a period of at least two years from the date of this judgment," and "to conduct yearly training of each of its managers, including store managers, regarding [Domino's] sexual harassment and retaliation policy for a period of two years from the date of this judgment." App. B at 16a-17a. The scope of this remedy far outstrips the isolated Title VII violation giving rise to it. *See Rizzo*, 423 U.S. at 378.

The injunction imposed here is also inappropriate in light of the nearly seven-year time gap between the allegedly improper conduct and the District Court's judgment. This suit was brought as the result of a discrete series of events occurring between January and May of 1988. The District Court's opinion was issued more than seven years later, on November 17, 1995.

Courts outside the Eleventh Circuit have held that, where a significant amount of time has lapsed between the illegal activity and imposition of an injunction, equitable relief is inappropriate. *See, e.g., Webb v. Missouri Pac. R.R. Co.*, 98 F.3d 1067, 1069 (8th Cir. 1996) (even findings of widespread discrimination do not support an injunction issued five years after the close of all the evidence); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1394 (5th Cir. 1983) (holding injunction inappropriate where last testimony about class-wide discriminatory treatment was seven years old). The relief affirmed by the Eleventh Circuit here is even more inappropriate since the allegedly improper activity was a brief series of incidents that took place nearly a decade ago involving two individuals who are no longer employed by Domino's.

Because of the untimeliness and overbreadth of the injunctive relief ordered by the District Court and affirmed by the Eleventh Circuit in this case, Domino's respectfully requests that this Court grant its Petition for a Writ of Certiorari to consider the permissible scope of injunctive relief under Title VII.

III. THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THIS COURT.

In the District Court and in the Eleventh Circuit, Domino's generally denied any liability under Title VII. This Court should not, however, limit Domino's to these specific arguments, and should allow Domino's to raise the questions presented in this Petition. This Court has said that "[o]ur traditional rule is that "once a federal claim is properly presented, a party can make any argument in support of the claim; parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (petitioner had not raised point below and had even expressly disavowed it in both lower federal courts; this Court characterized point as "a new argument to support what has been his consistent claim.").

In addition, the questions presented here were also raised in Domino's Suggestion of Rehearing En Banc in the Eleventh Circuit. *Banker's Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 77 (1988) (Court declined to address issues not raised and passed on in state court, but noted that result might have been different if party had raised issue on rehearing below).

Moreover, this Court should allow Domino's to raise any issue that the District Court and Court of Appeals "passed upon." *Lebron*, 513 U.S. at 379. *See also Virginia Bankshares Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991) (If court below passed on issue presented, particularly where issue is in a state of evolving definition and uncertainty and is one of importance to the admin-

istration of federal law, the Court will consider an issue not raised below).

In any event, even if this Court finds that the questions Domino's has presented were not otherwise preserved, it may still consider them. The decision to review issues presented for the first time is a prudential determination in the context of cases arising from federal courts. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (citing *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980)). Here, Domino's decision to raise issues in its Suggestion of Rehearing En Banc in the Eleventh Circuit and in this Petition for a Writ of Certiorari that were not raised in its initial brief on appeal was based in large part upon intervening decisions such as *Faragher*, which brought to light the evolving nature of the law on issues that Domino's had not anticipated or previously considered. Because the questions presented by Domino's are important and timely, and are based on evolving principles of law, this Court should exercise its discretion to grant Domino's Petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the case set for full briefing and argument. In the alternative, the Petition should be granted, the judgment vacated, and the case remanded to the United States Court of Appeals for the Eleventh Circuit for reconsideration in light of *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc), *petition for cert. filed*, No. 97-282 (August 13, 1997).[8]

Respectfully submitted,

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[8] *Stutson v. United States*, —— U.S. ——, 116 S.Ct. 600 (1996), and *Lawrence v. Chater*, —— U.S. ——, 116 S.Ct. 604 (1996), provide this Court with ample authority to enter a "GVR" order in this case.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3600

D.C. Docket No. 91-1020-CIV-T-15A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee-Cross-Appellant,

DAVID PAPA,
Intervenor-Plaintiff-Appellee,

versus

DOMINO'S PIZZA, INC.
Defendant-Intervenor-Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(April 17, 1997)

Before HATCHETT, Chief Judge, BARKETT, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B

[Filed Nov. 17, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 91-1020-CIV-T-25(A)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

and

DAVID PAPA,
Intervenor/Plaintiff,

v.

DOMINO'S PIZZA, INC.
Defendant.

ORDER

This cause was heard by the Court on November 14-17, 1994. Plaintiff ("EEOC") and Intervenor/Plaintiff ("Papa") claim that Defendant ("Domino's") violated Title VII by subjecting Papa to a sexually hostile work environment, engaging in *quid pro quo* harassment, and retaliating against him for lawful actions. Pursuant to the evidence presented at trial, the Court makes the following findings:

I. FINDINGS OF FACT

1. This is an action under §§ 703(a)(1) and 704 of Title VII of the Civil Rights Act of 1964, as amended. This action was filed by Plaintiff, Equal Employment Opportunity Commission ("EEOC") pursuant to § 706(f)(3)

of Title VII, 42 U.S.C. § 2000e-5(f)(3). This Court has jurisdiction pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, 1345 and 42 U.S.C. §§ 2000e-5(f)(1) and (3).

2. David Papa ("Papa") is intervenor/plaintiff herein. Papa was the store manager of the Defendant's Port Richey store in January, 1988.

3. Defendant Domino's Pizza, Inc. (Domino's) employed Papa and is an employer within the meaning of Title VII, 42 U.S.C. § 2000e(b).

4. Beth Carrier ("Carrier") was Papa's immediate supervisor and Defendant's Corporate Area Supervisor. Papa's performance under Carrier was more than satisfactory. In fact, Papa had been promoted at least twice while under her supervision. Just prior to the termination complained of herein, Carrier had nominated Papa as "Manager of the Year."

5. At various times, from January 1988 until May 1988, the following occurred between Carrier and Papa:

a. Carrier would come into the store and place her hand on Papa and would rub his neck and back.

b. While standing besides him, Carrier would put her hand around Papa's waist.

c. At a business meeting at Carrier's residence, Carrier told Papa that he had a "nice ass" and that he shouldn't bend over as he did because it "turns me on."

d. Carrier told Papa that he had a "nice ass" on one other occasion when the two of them were distributing coupons to local residences.

e. Carrier stated, "I know you are having trouble with your wife, but you are separated now and would be interested in starting a relationship again."

f. Carrier told Papa that she loved him and cared about him.

g. Carrier told Papa that she would never treat him like his estranged wife did and told him "just think Dave, you could become a supervisor and I could stay home and take care of David [Papa's young son]."

h. On one occasion, Carrier was standing next to Papa in the store and put her arm on his back while talking to him; when he moved away, Carrier moved close, put her arm around his back again, and "reached down with her hand and she grabbed my behind and squeezed it."

i. On one occasion, Carrier was in the store helping to make pizza when she told him that her bra had slipped off and asked if that turned him on.

j. In April or May, Carrier came to his store and said, "You know how I feel about you. I care about you, and you and David are more than welcome to come live with me . . . . you know I love you." Papa ordered her from his office and threatened to report the conduct to her supervisor. Upon leaving the store, Carrier told Papa that she would "get him."

6. Papa claims that Carrier's sexual advances embarrassed him and made him feel uncomfortable. His testimony was corroborated by employees who observed several of the incidents described above. There is no evidence that he provoked or encouraged Carrier's sexual overtures.

7. Approximately six days after the incident described in paragraph 5(j) Carrier and Mike Haskins, Carrier's superior, came to the store and fired Papa.

8. The reason for termination proffered by Carrier and Haskins at the time they fired Papa, and the reason proffered by the Defendant at trial are the same. That is that

Papa was fired for violating company policy. One alleged violation was the payment of an employee, Mr. Whetzel, out of the mileage account rather than the labor account. Defendants also claim that Papa hid coupons and "lates" (discounts for late deliveries) in order to improve the appearance of the store's financial position. Defendant characterizes these activities as "manipulation of paperwork."

9. The evidence did not support Defendant's claim that Papa was responsible for hiding coupons or lates, or that he directed Whetzel to seek payment from the mileage fund. Instead, the evidence showed that Carrier instructed employees to hide coupons and lates. Furthermore, months before Papa's firing, Carrier approved Whetzel's idea to rollover the labor cost into his mileage account and directed Whetzel to carry out his idea.

10. Papa did not instigate or implement the "roll over" from the labor account to the travel account for Whetzel. In fact Papa did not know that it was a violation of company policy. On the contrary, Papa testified that he did not believe it a violation of company policy because Carrier approved Whetzel's idea. Furthermore, Carrier reviewed the daily paper work frequently and would have noticed the changes in Whetzel's mileage, prior to Papa being fired.

11. Defendant submitted no evidence of prior misconduct or deficient performance on the part of Papa. Nor did Defendant show that it was notified of Papa's alleged "manipulation of paperwork" by anyone other than Carrier.

12. During the time Papa managed Domino's Port Richey store, he earned $350 per week and received a bonus averaging $606 for every four-week period.

13. The Court finds that Papa did seek employment in fast-food management after he was terminated from Domino's but was prevented from obtaining employment

because he reported to prospective employers that he was terminated by Domino's for "manipulation of company paperwork." Papa did find work in Rhode Island and continued to work at various restaurant jobs until his back was injured in October of 1991. Thereafter, he attended Fisher College part-time and the University of Rhode Island full-time for three terms and part-time for a fourth term. In 1994, Papa discontinued his job search for work in fast food management and decided to enter college to train for another profession.

II. CONCLUSIONS OF LAW

A. Hostile Environment

1. A prima facie case of sexual harassment under the hostile environment theory is established where the Plaintiff shows, by a preponderance of the evidence, that:

(a) the employee belongs to a protected group;

(b) the employee was subjected to unwelcome sexual harassment;

(c) the harassment complained of was based on sex;

(d) the harassment complained of affected a term condition or privilege of employment in that it was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment; and

(e) the employer is liable.

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986), *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

2. Papa is a man, hence for the purposes of a sexual discrimination case he is a member of a protected group. *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).

3. Papa was subjected unwelcome sexual harassment. Actions such as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" may be considered by the Court as evidence of sexual harassment. *Henson*, 682 F.2d at 903. Furthermore, the conduct must be unwelcome in that the "employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive". *Id.* Carrier's conduct, detailed in paragraph 5 of Findings of Fact *infra*, embarrassed Papa and made him feel uncomfortable. His discomfort was so acute that he even took the step of instructing another employee to be present whenever Carrier visited the store. Furthermore, Papa made it clear to Carrier that her sexual advances were unwelcome, yet she persisted in making them.

4. Carrier's harassment of Papa was based on his sex. "In proving a claim for a hostile work environment due to sexual harassment, the Plaintiff must show that, but for the fact of his sex, he would not have been the object of harassment. *Bundy v. Jackson*, 641 F.2d 934, 942-43. *Phillips v. Martin Marietta Corp.*5, 400 U.S. 542, 91 S.Ct. 496, 26 L.Ed. 2d 613. This case involves a female supervisor making sexual demands of a male subordinate. Carrier's demands were being made of Papa because he is male, hence this element is clearly established. *Henson*, 682 F.2d at 903-04.

5. Carrier's harassment was sufficiently severe enough to create a hostile and abusive work environment which affected a "term, condition or privilege" of Papa's employment.

a. "For sexual harassment to be actionable it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Meritor Savings*, 106 S.Ct. at 2405 *citing Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). As the Supreme Court explained in *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370 (1993), there is no precise test

for determining whether conduct created a hostile and abusive atmosphere. The *Harris* Court did provide guidance however, by stating that "Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*

b. Papa protested Carrier's harassment and on one occasion explicitly instructed Carrier not to touch him. In order to avoid unwanted contact with Carrier, Papa resorted to asking employees to be present when she was present in his store. Undoubtedly, the terms and conditions of Papa's employment were altered when he had to confer with his superior in the presence of his subordinates. Finally, when Plaintiff ordered Carrier from the Port Richey store and threatened to report her to her boss, her retaliatory response, "David I'll get you" led to his termination several days later—the most severe alteration of the terms of Papa's employment.

6. Domino's is directly liable for Carrier's creation of a hostile and abusive work environment. The Supreme Court touched on employer liability in *Meritor Savings* by holding that employers are neither strictly liable for the actions of its supervisory employees who create a hostile atmosphere, nor exempt from liability when they have not been notified directly. *Meritor Savings*, 106 S.Ct. at 2408. The Eleventh Circuit has established more explicit guidelines for determining when an employer can be liable for the actions of employees who have created a hostile work environment. The employer may be either directly liable or indirectly liable via *respondeat superior*. *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

a. Domino's is not liable via *respondeat superior*. In order to hold an employer indirectly liable for the

actions of its employees, the plaintiff must establish that the employer knew, or should have known of the harassment and failed to take remedial action. *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1512 (11th Cir. 1989). The plaintiff can meet this burden either by showing that he "complained to higher management, or that the harassment was pervasive enough to charge the employer with constructive knowledge." *Id.* Papa never made a report of harassment to anyone at Domino's, although he testified that he attempted to contact Haskins about Carrier's conduct. Furthermore, although the harassment was pervasive in the workplace, no one from Domino's management was there to observe Carrier's conduct. Accordingly, Domino's had neither actual or constructive knowledge of the hostile atmosphere created by Carrier.

b. However, Domino's is directly liable for Carrier's actions. Where the harasser is the employer or an agent of the employer the employer is directly liable. *Vance*, 863 F.2d at 1512. The Eleventh Circuit adopted the EEOC's view that "supervisor acts as an 'agent' of the employer . . . where [the] supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decision affecting the employment status of his subordinates." *Sparks*, 830 F.2d at 1558-59. As his supervisor, Carrier possessed the authority to fire Papa. When she fired Papa, Carrier exercised the authority delegated to her by Domino's. Domino's direct liability is not impaired by the lack of actual or constructive notice of Carrier's harassment. *Id.*

7. Plaintiffs have established a *prima facie* case that Domino's violated Papa's right to be free from a sexually hostile and abusive atmosphere.

B. *Quid Pro Quo*

8. To establish a prima facie case of *quid pro quo* harassment, the plaintiff must prove:

(1) the employee belonged to a protected group;

(2) the employee was subject to unwelcome sexual harassment;

(3) the harassment complained of was based on sex; and

(4) the employee's reaction to the unwelcome behavior affected tangible aspects of the employee's compensation, or terms, conditions or privileges of employment.

Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, (11th Cir. 1987);

9. The first three elements listed above are identical to those discussed in paragraphs 2-4 of the Conclusions of Law listed above. The Court need not repeat its analysis, and finds that the first three elements of *quid pro quo* harassment have been met.

10. Papa's reaction to Carrier's unwelcome sexual advances affected tangible aspects of his compensation, terms, conditions or privileges of employment. The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability under this theory of sexual harassment. *Henson, Supra,* at 908. Only six days prior to Papa's termination, Carrier came to Papa's store, expressed her love for him, and invited him to live with her. Papa ordered her to leave the store and threatened to notify her superior. Carrier's threatened to get even. True to her word, Papa's final and most vehement rejection of Carrier's advances resulted in his termination.

11. Plaintiff's have established a *prima facie* case that Domino's [1] violated Papa's rights to be free from *quid pro quo* sexual harassment.

---

[1] Again, Domino's is directly liable for the actions of Carrier, in whom it vested the authority to terminate Papa. See paragraph 6 *supra.*

C. Retaliatory Discharge

12. To prevail on a claim of retaliation under Title VII, Plaintiff must establish, by a preponderance of the evidence the following:

(1) That he was engaged in a statutorily protected activity;

(2) That the employer has taken an adverse employment action against him; and (3) That a causal connection exists between the two.

Donnellon v. Fruehauf Corporation, 794 F.2d 598 (11th Cir. 1986).

13. Papa has established a *prima facie* case of retaliation under Title VII.

a. When Papa voiced his opposition to Carrier's sexual advances at the meeting approximately six days prior to his discharge, he was engaging in protected activity under section 704(a) of Title VII.

b. His termination by Carrier, within approximately six days was an adverse employment action taken by his employer.

c. The short period of time and Carrier's comment immediately following the incident that she would "get him", or "fix him" clearly proves a causal connection between the protected activity and the firing.

D. Plaintiffs' Ultimate Burden of Persuasion.

14. Plaintiffs' having made a *prima facie* case of hostile atmosphere, *quid pro quo,* and retaliatory discharge; the burden of production then shifts to Defendant. The employer is obliged to rebut Plaintiffs' case with a "legitimate, nondiscriminatory reason for its action. If the defendant carries this burden of production, then the court must inquire whether the stated reason is merely pre-

textual" *Donnellon v. Fruehauf Corporation*, 794 F.2d at 600. This burden equally applies to the hostile environment and the quid *pro quo* theories of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

15. The Court concludes that the reasons proffered by Defendant for Papa's termination were pretextual. The facts of this case lead the Court to conclude that Carrier reported Papa for her own misdeeds and not because he was guilty of hiding coupons and lates or for improperly paying Whetzel from the mileage fund. Carrier's report of Papa's alleged misconduct was made out of spite and in retaliation for Papa's rejection of her sexual advances. Without her intervention Papa would not have been fired.[2]

16. Having determined that Defendant's proffered reasons were pretextual, the Court now concludes that Plaintiffs have met their ultimate burden of persuasion. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1992). The Court concludes that Plaintiffs have demonstrated by a preponderance of the evidence that Domino's discriminated against Papa by violating his right to be free from a sexually hostile and abusive atmosphere; *quid pro quo* harassment; and retaliation for exercising a lawful right. Plaintiffs are therefore entitled to a judgment.

E. Damages

17. Papa, as a victim of unlawful discrimination, is entitled to be "made whole." *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1526 (11th Cir. 1991). Plaintiffs seek damages for back pay, reinstatement or front pay, and injunctive relief.[3]

---

[2] Domino's knowledge of Carrier's motivation or intent in procuring or justifying Papa's termination is irrelevant. As discussed above, for purposes of Title VII liability, Carrier's actions were the actions of Domino's.

[3] The facts giving rise to this cause of action arose in 1988, hence Papa's remedies are limited to those available under Title VII at that time.

18. Defendant contends that Papa's damages should be reduced for failure to mitigate his damages. However, the Court concludes that Papa made reasonable efforts to obtain substantially equivalent work and thus can not be faulted for failure to mitigate his damages.

19. Papa is presumptively entitled to back pay from the date of discharge to the date of trial, minus his interim earnings. However, the Court finds that David Papa will be "made whole" with an award of damages from the date of termination up to September, 1994 when he began college to change careers.

20. No award of front pay nor a reinstatement requirement is necessary to complete the make whole remedy. "Front pay is only appropriate when back pay and other damages will not fully compensate Plaintiff for his damages." *Dillion v. Coles*, 746 F.2d 998 (3rd Cir. 1984). Back pay is sufficient to fully compensate Plaintiff for the injury he suffered as a result of Defendant's conduct.

21. The Court basis its damage calculations upon the following findings:

a. Papa's salary and bonuses are held constant at the level Plaintiff earned when terminated; $350.00 dollars per week and a bonus of $750.00 dollars every four weeks.

b. The employer's contribution for FICA is awardable to Plaintiff.

c. Papa is entitled to recover for his out of pocket expenditures for health insurance.

d. Papa is not entitled to recover projected employer contributions to a retirement plan as he did not elect to participate in the plan during his employment.

e. Interest is compounded annually using the I.R.S. adjusted prime rate.

g. Damages ceased to accrue on September 1, 1994. However, prejudgment interest accrues to the date of judgment.

	1988 5/27/88 to 12/31/88	1989	1990	1991	1992	1993	1994	1995 1/1/95 to 11/16/95
Salary	10,920.00	18,200.00	18,200.00	18,200.00	18,200.00	18,200.00	13,650.00	
Bonus	5,850.00	9,750.00	9,750.00	9,750.00	9,750.00	9,750.00	7,312.50	
Health Insurance	840.00	1,440.00	1,373.00	1,757.00	2,291.64	2,291.64	1,718.73	
Social Security	1,035.40	1,732.90	1,732.90	1,732.90	1,732.90	1,732.90	1,299.65	
(Interim [4] earnings)	(6,000.30)	(6,245.16)	(3,823.20)	(8,563.97)	(4,953.17)	(0.00)	(453.61)	
Damages	12,645.10	24,877.74	27,232.70	22,875.93	27,021.37	31,974.54	20,134.99	
Annual Rate cumulative	5.25%	11.5%	11%	10.25%	8%	7%	7%	4.67%
Subtotal	0.00	13,036.15	42,273.98	77,125.42	110,281.25	148,286.83	192,879.67	227,925.68
Interest	391.05	4,360.10	7,645.74	10,252.91	12,618.30	12,618.30	14,911.03	9,331.84
Subtotal	13,036.15	42,273.98	77,152.42	110,281.25	148,879.67	192,879.67	227,925.68	237,257.52
TOTAL								237,257.52

[4] Interim earnings are salary plus social security tax.

22. Plaintiff is entitled to the requested injunctive relief.

23. Counsel for Papa is entitled to recover reasonable attorney's fees. Counsel for an intervenor is not precluded from recovering her fees merely because the E.E.O.C. actively investigated and prosecuted the case. *E.E.O.C. v. Clear Lake Dodge*, 60 F.3d 1146 (5th Cir. 1995). In this case, the Intervenor's counsel has represented Papa since the time of the charge, and her work in particular resulted in a significantly greater award of damages than that requested by the E.E.O.C. However, the Court does not have sufficient information upon which to base an award of fees at this time. As in all cases the Court must review the attorney's fee application to make sure that payment is requested "only for those lawyer hours that are reasonably necessary to adequately prosecute the case." *Id.* at 1154 (citation omitted). Therefore, upon appropriate application, the Court will award attorney's fees to the Intervenor.

24. The Court has reconsidered its request for supplemental material on damages and did not use any supplemental material provided in reaching its determination on damages.

It is therefore ORDERED:

1. The Clerk is directed to enter judgment on damages in favor of Papa and against Defendant and a judgment on injunctive relief in favor of both Plaintiffs and against Defendant. Damages are awarded in the amount of $237,257.52. Attorney's fees will be awarded to Intervenor's counsel by separate order.

2. Pursuant to 42 U.S.C. § 2000e-3(a). Defendant Domino's Pizza, Inc., its officers, managers, supervisors, successors and assigns are permanently enjoined from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment

and or which discriminates against employees who oppose what the employee believes to be a discriminatory employment decision.

3. Defendant is directed to post a written sexual harassment and retaliation policy in each of its stores for a period of at least two years from the date of this judgment.

4. Defendant is directed to conduct yearly training of each of its managers, including store managers, regarding Defendant's sexual harassment and retaliation policy for a period of two years from the date of this judgment. The purpose of this training is to fully disseminate Defendant's sexual harassment and retaliation policy to all of its employees.

5. Defendant's Motion to Strike Plaintiff's filing (Dkt. 119) is GRANTED insofar as the Court did not consider that submission in reaching its decision.

DONE AND ORDERED at Tampa, Florida this 16th day of November, 1995.

/s/ Henry Lee Adams Jr.
HENRY LEE ADAMS, JR.
United States District Judge

Copies to: Counsel of Record

APPENDIX C

[Filed Jul. 3, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3600

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee-Cross-Appellant,

DAVID PAPA,
Intervenor-Plaintiff-Appellee,

versus

DOMINO'S PIZZA, INC.
Intervenor-Plaintiff-Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: HATCHETT, Chief Judge, BARKETT, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the appellant is, denied.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

[Filed Jul. 3, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3600

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee-Cross-Appellant,

DAVID PAPA,
Intervenor-Plaintiff-Appellee,

versus

DOMINO'S PIZZA, INC.
Defendant-Intervenor-Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT, Chief Judge, BARKETT, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

APPENDIX D

[Filed Nov. 20, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case Number 91-1020-Civ-T-25A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

DAVID PAPA, *Plaintiff*

v. *Intervenor/Plaintiff*

DOMINO'S PIZZA, INC.,

Defendant

JUDGMENT IN A CIVIL CASE

☒ Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered on damages in favor of Papa and against Defendant and a judgment on injunctive relief in favor of both Plaintiffs and against Defendant. Damages are awarded in the amount of $237,257.52.

Defendant Domino's Pizza, Inc., its officers, managers, supervisors, successors and assigns are permanently enjoined from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment and or which discriminates against employees who oppose what the employee believes to be a discriminatory employment decision.

Date: November 20, 1995

DAVID L. EDWARDS
Clerk

/s/ Carol A. Reynolds
(By) Deputy Clerk

(2)

Supreme Court, U.S.
FILED
NOV 12 1997
CLERK

No. 97-552

In The

Supreme Court of the United States

October Term, 1997

DOMINO'S PIZZA, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

and

DAVID PAPA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT DAVID PAPA IN OPPOSITION

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3 pp

QUESTIONS PRESENTED

1. Whether this case is an appropriate vehicle for clarification of the standard for imposing liability on employers for hostile working environment sexual harassment, where:

a. this employer is also liable for *quid pro quo* sexual harassment and retaliatory discharge, and any clarification of standards of liability for hostile environment sexual harassment would not change the result here; and

b. there is general agreement among the circuit courts of appeals as to the standards for employer liability for *quid pro quo* sexual harassment and retaliatory discharge.

2. Whether the nature and scope of the injunctive relief ordered by the district court was within its discretion under the circumstances of this case.

3. Whether the issues addressed in the petition for writ of *certiorari* are properly before this Court where they were not raised or considered below.

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STATEMENT OF THE CASE

1. Statement of the Facts

David Papa was hired by Domino's Pizza, Inc. (Domino's) in June, 1986 as a Manager in Training. In March, 1987, Beth Carrier became Corporate Area Supervisor for Mr. Papa's area. Ms. Carrier promoted Mr. Papa to the position of Manager in June, 1987. While Mr. Papa was employed as Manager of the Port Richey, Florida store, Richard Contois was employed there as Manager in Training, and Donald Whetzel was employed there as a driver. Ms. Carrier was Mr. Papa's immediate supervisor while he managed the Port Richey store.

In early January, 1988, Mr. Papa's marriage was failing and he had sole custody of his little son. Between January and June, 1988, Mr. Papa was subjected to a sexually hostile working environment by Beth Carrier. On a number of occasions, Ms. Carrier told Mr. Papa he had a "nice ass" and placed her hand on his shoulder. Ms. Carrier also touched his buttocks and squeezed them. He repeatedly asked her not to do these things.

On one occasion, Ms. Carrier was helping to make pizza in Mr. Papa's store, slapping the dough with her hands. Then she informed Mr. Papa that her bra had slipped off, requested that he look, and asked him if it turned him on. Mr. Papa objected, telling her to stop it. Mr. Contois was a witness to this.

Ms. Carrier also asked him if he had gotten over his relationship with his ex-wife, if he was dating yet, if he would consider getting married again or having a relationship. Mr. Papa responded that he did not want to talk

about his personal business, that he had just gone through a divorce and a custody battle, and was only interested in a professional working relationship. At that point, Ms. Carrier began to rub Mr. Papa's shoulders and he told her never to do that again.

Approximately six days before he was terminated, Mr. Papa was meeting with Mr. Whetzel and Mr. Contois in his office when Ms. Carrier entered the room. She again requested that Mr. Papa move in with her and told him she'd be a good mother for his son; Mr. Papa said he did not want to hear this. Next, she suggested that she and Mr. Papa should marry, she could take care of his son, and he could become a Domino's supervisor. Again he stated that he did not want to hear this.

When Ms. Carrier then professed her "love" for Mr. Papa, he got angry and ordered her from his office, informing her he would talk to her supervisor, Mike Haskins, about this. Ms. Carrier became very upset, walked to the door, turned and said "we'll see about that". Six days later, Ms. Carrier and Mr. Haskins fired Mr. Papa.

2. Procedural History

This case began in June, 1988 when Mr. Papa retained the undersigned counsel to represent him as to claims of hostile working environment and *quid pro quo* sexual harassment and retaliatory discharge by his Corporate Area Supervisor during his employment as a Domino's Store Manager. Following unsuccessful attempts to settle the matter for a few months' severance pay, Mr. Papa filed a charge containing these allegations with the Equal

Employment Opportunity Commission (EEOC) in September, 1988. The undersigned has represented Respondent Papa throughout the entire protracted course of this litigation for over nine years now.

After a thorough investigation, the EEOC found reasonable cause to believe Mr. Papa had been the victim of discrimination, and filed suit against Domino's on his behalf. Mr. Papa intervened. Following exhaustive discovery and a four day bench trial, the District Court issued Judgment in favor of Mr. Papa and the EEOC on all Counts, awarding him $237,257.52 in back pay damages, and later $34,641.49 in attorney's fees. Domino's appealed to the Eleventh Circuit Court of Appeals. Briefs on the merits were filed by all parties, and oral argument was heard. The Court of Appeals affirmed the District Court's Judgment without opinion, denied Domino's petition for rehearing and suggestion of rehearing *en banc*, as well as its motion for stay pending petition for writ of *certiorari*.

3. Questions Raised by Domino's

This case combines claims of hostile working environment and *quid pro quo* sexual harassment and retaliatory discharge, and thus is not an appropriate vehicle for further defining standards of liability in pure hostile environment cases, the one area in which some circuit courts of appeal differ. The District Court's award of injunctive relief does not warrant review. Ordering Domino's to post notices of its sexual harassment policies and to train managers in their use was a proper exercise of the court's discretion where a number of Domino's

employees testified that they were unaware of any such policies. Domino's did not raise or argue either of these issues below and should be foreclosed from doing so here, especially where the law in these areas has not changed since it filed its appeal to the circuit court.

ARGUMENT

I A COMBINED HOSTILE WORKING ENVIRONMENT AND QUID PRO QUO SEXUAL HARASSMENT CASE IS NOT THE PROPER VEHICLE FOR THE ANNOUNCEMENT OF NEW OR CLARIFIED STANDARDS OF EMPLOYER LIABILITY FOR PURE HOSTILE ENVIRONMENT HARASSMENT.

Domino's contention to the contrary, this case presents no difficult or important questions as to the law of employer liability for sexual harassment. Only in the area of hostile working environment claims have some courts disagreed on the formulation of appropriate standards for holding employers liable for supervisor and co-worker harassment; federal courts are unanimous in holding employers strictly liable for *quid pro quo* sexual harassment. In a case such as this one, where both hostile working environment and *quid pro quo* sexual harassment by a supervisor, as well as retaliatory discharge, are found, independent grounds exist for the District Court's decision to hold Domino's liable, so that any clarification of hostile working environment liability standards would not change the result here.

All monetary relief ordered by the District Court was in the nature of back pay and benefits, prejudgment

interest, attorney's fees and costs, and all such relief was attendant upon the job detriment Mr. Papa suffered because of his rejection of his supervisor's advances, his retaliatory discharge. No compensatory or punitive damages are at issue here; they were not awardable as this case arose before the effective date of the Civil Rights Act of 1991. So there were no damages awarded which were directly attributable to Mr. Papa's hostile working environment claim. Hence, even if the hostile working environment claim were not upheld, the relief to Mr. Papa would remain the same. *Certiorari* should not be granted under such circumstances.

A. Hostile Working Environment Sexual Harassment

Domino's challenges primarily the District Court's finding of liability for hostile environment harassment, and most of its Petition for *Certiorari* focusses on decisions in different circuit courts of appeals discussing employer liability for hostile working environment sexual harassment, an issue on which there is some disagreement. Even in hostile working environment jurisprudence, however, more areas of general agreement exist than Domino's suggests.

These cases are often decided with reference to agency principles found in the RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (the RESTATEMENT), as directed in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63 (1986), which establishes five theories under which employers may be held liable for actions of their employees:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

The RESTATEMENT has provided a flexible framework which has served federal courts deciding sexual harassment cases reasonably well for over a decade, and which Domino's would have this Court abandon.

A survey of relatively recent cases discussing employer liability for hostile working environment sexual harassment shows that they fall into two general categories: those that rely upon the use of actual or apparent authority or the existence of the agency relationship, and those that require actual or constructive notice to the employer of the hostile working environment allegations.

1. Use of Authority or the Agency Relationship

In *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994), the Second Circuit held that "an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship." *Id.* at 780. In so holding, the appeals court found the employer liable regardless of the absence of notice or the reasonableness of the employer's complaint procedures because the supervisor had capitalized upon his authority over the plaintiff's employment to force her to endure a demeaning sexual relationship.

Citing *Karibian*, the Second Circuit in *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), distinguished between supervisors alleged to have created a sexually hostile working environment who have the "authority to control significant aspects of the work environment" (1997 U.S. App. LEXIS 12805 at 26) and supervisors and co-workers lacking such authority. The plaintiff must allege facts which show a nexus between the supervisory authority and the harassment. *Id.* at 25. A four part rule was then announced. An employer will be held liable for supervisor harassment if:

a) the supervisor was at a sufficiently high level in the company, or

> b) the supervisor used his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, or
>
> c) the employer provided no reasonable avenue for complaint, or
>
> d) the employer knew (or should have known) of the harassment but unreasonably failed to stop it.

Id. at 20-21.

The Sixth Circuit's standard of liability for hostile environment claims of sexual harassment caused by the acts of a supervisor was first addressed in *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) and later reiterated in *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir. 1992), both of which applied modified agency principles. According to *Yates*:

> The essential question in applying agency principles is whether the act complained of took place in the scope of the agent's employment. This determination requires an examination of such factors as when the act took place, where it took place, and whether it was foreseeable.

Yates, 819 F.2d at 636.

Kauffman explained that this "scope of employment" standard for supervisors is distinguishable from the "knew or should have known" *respondeat superior* standard for co-worker harassment cases. In a case of hostile working environment harassment by a supervisor, the *Kauffman* court agreed with the Fourth Circuit in *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), vacated on other grounds, 900 F.2d 27 (4th Cir. 1990) that "an

individual qualifies as an employer under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." Under the standards set forth in *Yates* and *Kauffman*, the agency liability is not strict and can be negated if the employer takes adequate and effective remedial action once it has notice of the harassment. *Kauffman*, 970 F.2d at 184.

The Sixth Circuit took *Kauffman* a step further in *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (6th Cir. 1995), in deciding that an employer is liable for a supervisor's creation of a sexually hostile work environment "even if those acts are not committed within the actual scope of his employment, if the employee uses his apparent authority to accomplish the wrongful acts and so is acting within the 'apparent scope' of his employment." *Id.* at 1352. Whether his supervisors knew or should have known what he did is irrelevant.

The Tenth Circuit also relies on agency law to hold employers responsible for hostile environment sexual harassment of their supervisors. In *Hicks v. The Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), the court held that § 219(2) "creates employer liability when (1) the master was negligent or reckless, . . . and (2) where the servant purported to act or to speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Id.* at 1418. In accord was *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993). Where a supervisor has significant control over plaintiff's hiring, firing or conditions of employment, he has such authority over her employment as to render the employer liable for

his hostile work environment harassment, and no knowledge or recklessness on the part of the employer need be demonstrated. *Id.* at 1125.

The RESTATEMENT was also cited in *Harrison v. Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), which would hold the employer liable for a sexually hostile environment created by a supervisor "if the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment." *Id.* at 1446.

As will be discussed *infra*, the Eleventh Circuit Court of Appeals, the jurisdiction from which this case arose, also decides hostile environment liability questions based on agency principles. Its well-settled jurisprudence was the source for the District Court's conclusions of law herein.

2. "Knew or Should Have Known": the Negligence Standard

A minority of the circuits have decided cases involving employer liability for hostile working environment sexual harassment under a negligence standard. In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), a Title IX case, the court ruled an educational institution is liable for hostile environment harassment of an employee by its supervisor if an "official representing the institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it." *Id.* at 901.

In the Fourth Circuit, agency principles were combined with the negligence standard in the case of *Paroline, supra*. The same is true in the Fifth Circuit, as evidenced by *Canutillo Independent School District v. Leija*, 101 F.3d 393 (5th Cir. 1996), which cited *Paroline*.

The Seventh Circuit presented a more confused picture in the combined cases of *Jansen v. Packaging Corp. of America* and *Ellerth v. Burlington Industries, Inc.*, ___ F.3d ___, 1997 U.S. App. LEXIS 22266 (7th Cir. Aug. 12, 1997) (en banc). The entire court agreed only on the negligence standard for employer liability in hostile environment cases and strict liability for *quid pro quo* sexual harassment.

The Eighth Circuit applies the "knew or should have known" standard in supervisor-induced hostile environment cases, and the court in *Davis v. City of Sioux City*, 115 F.3d 1365 (8th Cir. 1997) declined to deviate from binding precedent to set a different rule. The *Davis* court explained, however, that the "knowledge requirement may be dropped where 'someone at the decision-making level in the corporate hierarchy has committed the wrong' ". *Id.* at 1368.

The other circuit deciding employer liability for hostile environment claims under the negligence rubric is the Ninth. In *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994), the court held that "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Id.* at 508, relying on *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

3. Effective Sexual Harassment or Grievance Policy

Two circuits have decided to absolve employers of liability for hostile working environment sexual harassment where they had promulgated policies enabling employees to complain of hostile working environment sexual harassment to upper management.

In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), the court concluded that an employer will not be held liable "if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee knew or should have known that the employer did not tolerate such conduct and she could report it to the employer without fear of adverse consequences." *Id.* at 1398.

The court in *Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3d Cir. 1994) held that "an effective grievance procedure – one that is known to the victim and that timely stops the harassment – shields the employer from Title VII liability for a hostile environment." *Id.* at 110.

Neither court mentions the rejection of that theory in *Meritor*, in which this Court made clear that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the plaintiff's] failure to invoke that procedure" does not insulate the employer from liability for a sexually hostile working environment. *Meritor*, 477 U.S. at 72.

B. Quid Pro Quo Sexual Harassment

All circuit courts of appeals uniformly agree with this Court in *Meritor* that employers are strictly liable for *quid pro quo* sexual harassment. *Meritor*, 477 U.S. at 70-71.

C. Sexual Harassment Liability in the Eleventh Circuit

The seminal sexual harassment case was *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). In *Henson*, the Eleventh Circuit applied the "knew or should have known" negligence standard for hostile working environment sexual harassment by a co-worker or supervisor, but stated that if the supervisor was the plaintiff's employer, the City would be liable for his actions. The *Henson* court considered the *quid pro quo* claim separately, holding that, where an employee's rejection of the supervisor's harassment causes her to suffer a tangible job detriment, the employer is held liable for the supervisor's harassment. The court noted that many cases could be characterized interchangeably as hostile environment or *quid pro quo* cases.

After *Meritor* was decided, the Eleventh Circuit further clarified employer liability standards in the case of *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987), holding that, while notice to the employer may be necessary where the supervisor was not acting as an agent in that he had no authority over the employee he was harassing, where the harasser was plaintiff's employer or its agent, *respondeat superior* did not apply and no notice was necessary. The *Sparks* court noted that

"to the extent that the Henson court's discussion of hostile work environment sexual harassment can be read as holding that notice to the defendant employer is required even where the supervisor was the defendant's agent, and thus the victim's 'employer', it was overruled by the Supreme Court in *Vinson*. *Vinson*, 106 S.Ct. at 2408." *Sparks*, 830 F.2d at 1559, n.7.

Most important, *Sparks* made clear that where both *quid pro quo* and hostile environment by the employer's agent are shown, the employer is held strictly liable. Where the supervisor threatened to use the authority delegated to him to the plaintiff's detriment, the court need not address "what rule should govern the employer's liability for sexual harassment by its supervisors where the sexual harassment claim rests 'exclusively' on a 'hostile environment' theory. *Id.* at 1560.

Such a pure hostile environment case was *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989). In *Steele*, the court explained that the

> standard for determining corporate liability due to a supervisor's sexual harassment depends on the type of sexual harassment that occurs. In a quid pro quo case, the corporate defendant is strictly liable for the supervisor's harassment- . . . This is logical. When a supervisor requires sexual favors as quid pro quo for job benefits, the supervisor, by definition, acts as the company. In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the quid pro quo. In that case the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose.

> He acts within the scope of his actual or apparent authority to hire, fire, discipline or promote . . . Strict liability is illogical in a pure hostile environment setting. In a hostile environment case, no quid pro quo exists. The supervisor does not act as the company; the supervisor acts outside "the scope of actual or apparent authority to hire, fire, discipline, or promote." Corporate liability, therefore, exists only through respondeat superior; liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.

Id. at 1316.

This statement of the law of employer liability is still followed today in most circuits. It was not changed in any essential feature by the recent case of *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (*en banc*), which itself does not conflict with standards applied in other circuits, contrary to Domino's contention in its Petition for *Certiorari*. *Faragher* cites *Sparks* and *Steele* repeatedly with approval and once again explains the distinction between a pure hostile environment case (the *Steele* paradigm) and one which combines both *quid pro quo* and hostile working environment (the *Sparks* paradigm). *Id.* at 1537. Accord, *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990).

The case at bar combines *quid pro quo* and hostile working environment sexual harassment claims, as well as retaliatory discharge, and so was properly decided under the *Sparks* agency rationale. Accordingly, it is not

an appropriate vehicle for a pronouncement of new or clarified standards, which in any event are not needed, where most circuits, including the Eleventh, agree on the broad principles of employer sexual harassment liability.

D. Rebuttal to Domino's Statement Regarding This Case

In its Section I C., Domino's makes several misleading statements with regard to the instant case. After stating that the District Court had found that Mr. Papa's supervisor, Ms. Carrier, had inappropriately touched him, made a number of sexually-related comments to him and expressed her "love" for him, Domino's claims that "these were all modes of harassment easily available to a non-supervisory employee". (Petition, p. 19). Whether a non-supervisory employee could have taken these actions is irrelevant here; the fact is that Mr. Papa's supervisor perpetrated this harassment and was aided in doing so by the existence of the agency relation.

Domino's contends that "the trial court did not find that Carrier made any sexual demands, let alone that the conduct in question was accompanied by statements or suggestions that, if Papa did not submit to her overtures, a job detriment would occur." (Petition, p. 19). But the District Court found that "Papa's reaction to Carrier's unwelcome *sexual advances* affected tangible aspects of his compensation, terms, conditions or privileges of employment" when, after she "invited him to live with her", he rejected her advances and warned he would notify her supervisor, she "threatened to get even". *EEOC and Papa v. Domino's Pizza, Inc.*, 909 F. Supp. 1529, 1536 (M.D. Fla.

1995). (*Emphasis supplied*). Domino's may see some distinction between "demands" and "advances", but none exists in the case law.

Domino's asserts that Ms. Carrier did not "accomplish" the harassment in question by using her role as supervisor (Petition, p. 20), but in what other role could she have continually entered his store, touched his neck, back and buttocks, told him he had a "nice ass" which "turns me on", and urged him to move in with her? Mr. Papa would not have felt coerced to tolerate such treatment by a customer or subordinate; he would have sent them packing. Only when he most vehemently rejected Ms. Carrier's advances, did she turn and threaten to "get him", a threat on which she acted six days later when she fired him.

The statement on page 20 of Domino's Petition that "there was no finding that Carrier made any threats, conditions or demands to elicit sexual favors from Papa in the present case", simply defies the facts. When Mr. Papa rejected her "love" and exhortation to move in with her, she warned she would "get him". *Id.* at 1533. Both the District Court and the Eleventh Circuit interpreted this as a threat, and one on which she made good.

Defendant's attempt to cast doubt on the District Court's finding of *quid pro quo* sexual harassment is similarly unavailing where the job detriment, termination from employment, was so clearly linked to Mr. Papa's final rejection of his supervisor's advances. The facts in *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548 (11th Cir. 1997) are entirely unlike the circumstances of the case under consideration. In *Farley*, the harasser was not the

plaintiff's supervisor during the harassment period, and had no actual or apparent authority to affect the terms of the plaintiff's employment. *Id.* at 1553. In this case, Ms. Carrier was Mr. Papa's supervisor, with the authority to fire him, which she did.

Domino's insistence on misstating the District Court's findings of fact and conclusions of law is especially irksome for its repeated assertion that the "trier of fact makes no finding that the supervisor made explicit sexual requests or demands". (Petition, p. 21). The District Court referred to Ms. Carrier's conduct as "unwelcome sexual advances", and described her sexually-oriented verbal and physical conduct in detail. Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature". *Henson*, 682 F.2d at 903. Hence, the District Court made findings sufficient to render Domino's liable for both hostile environment and *quid pro quo* sexual harassment.

Domino's is confused as to the distinction between a *quid pro quo* sexual harassment claim and a retaliatory discharge claim, but the difference is self-evident. In a *quid pro quo* claim, the plaintiff suffers a job detriment (perhaps a demotion, a pay cut, or termination) because of his rejection of his supervisor's sexual advances. In a retaliatory discharge, the plaintiff is dismissed because he has complained, reported or testified, or threatened to complain, report or testify concerning conduct made unlawful by § 704(a), the "opposition clause" of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The District Court found that, when Mr. Papa "voiced his opposition to Carrier's sexual advances

at the meeting approximately six days prior to his discharge, he was engaging in protected activity under section 704(a) of Title VII." *EEOC and Papa v. Domino's Pizza, Inc.*, 909 F. Supp. at 1536.

In its footnote 7 on page 21 of the Petition for *Certiorari*, Domino's gives the erroneous impression that the District Court found only that the motivation for Ms. Carrier's report that Mr. Papa had engaged in "manipulation of paperwork", which led to his termination, was "improper". The District Court found that Ms. Carrier's report was made "in retaliation for Papa's rejection of her sexual advances". *Id.* at 1537. As such, the District Court found Domino's asserted reason for Mr. Papa's termination to be pretextual. Mr. Haskins had no role in Mr. Papa's termination other than accompanying Ms. Carrier to accomplish this task. The District Court found that his (and Domino's) only notice of this alleged "manipulation" came from Ms. Carrier. *Id.* at 1534.

In sum, Domino's has failed to show that the District Court's decision was erroneous in any respect, whether on the facts or the law, as to the hostile working environment and *quid pro quo* sexual harassment claims or the retaliatory discharge claim. Consequently, this case does not provide a springboard for this Court to elucidate the already clear distinctions between these kinds of claims.

II THE NATURE AND SCOPE OF THE INJUNCTIVE RELIEF ORDERED BY THE DISTRICT COURT WAS WITHIN ITS DISCRETION UNDER THE CIRCUMSTANCES OF THIS CASE.

Domino's complains that, because the trial court found one employee had been sexually harassed a number of years ago by one supervisor at one of its many locations, the injunctive relief ordered by the District Court was overbroad, but this contention is unsupported by the law. The time gap between the unlawful conduct and the present is largely the result of Domino's own delays and intransigence, and is, in any event, irrelevant.

This Court has held that "the grant or denial of an injunction is committed to the sound discretion of the district court . . . Although the court found that discrimination no longer exists, the power to issue an injunction survives discontinuance of the illegal conduct sought to be enjoined." *N.A.A.C.P. v. City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982), citing *United States v. W.T. Grant*, 345 U.S. 629, 633 (1953).

In this case, the EEOC was the plaintiff, and Mr. Papa the intervenor. The EEOC may pursue broader equitable remedies than an individual claimant. *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993). *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997). In *Massey Yardley*, an individual age discrimination case, the EEOC asked for an order enjoining the employer from further age discrimination and requiring company management to undergo EEOC training and posting of notices. The trial court denied injunctive relief

and the Eleventh Circuit reversed, remanding to the district court to grant the requested relief.

Even though the plaintiff had decided not to seek reinstatement, the *Massey Yardley* court noted there would be "little point in [EEOC's] having the independent power to sue if it could not obtain relief beyond that fashioned for the individual claimant." *Id.* at 1253. The court reasoned that

> the EEOC is normally entitled to injunctive relief where it proves discrimination against one employee and the employer fails to prove that the violation is not likely to recur. The EEOC represents the public interest when litigating claims, and, through injunctive relief, seeks to protect not only the rights of the individual claimant, but those of similarly-situated employees by deterring the employer from future discrimination . . . "In this respect, the EEOC acts to vindicate the public interest in preventing employment discrimination."

Id. at 1253, citing *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987), and quoting *General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980).

In *Massey Yardley*, where there was no evidence that the employer's anti-harassment policy was disseminated, the employer had failed to prove that the violation was unlikely to recur. Similarly, here the District Court ordered Domino's to post notices of its anti-harassment and retaliation policies based on testimony from four employees that they had not ever seen the policies and from three employees that they had not been trained in them. I Tr. 54-55; II Tr. 169; Stout Dep. 78; Cerniglia Dep.

104, 115; Contois Dep. 67-69. In enjoining the company from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment or retaliation for opposing discriminatory employment practices, the District Court merely ordered Domino's to obey the law.

> Under Title VII, courts have been granted broad equitable powers to remedy statutory violations by fashioning the most complete relief possible . . . The district courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" . . . The particular remedy granted is left largely to the broad discretion of the district court.

Kilgo v. Bowman Transportation, Inc., 789 F.2d 859, 879-80 (11th Cir. 1986). [Citations omitted].

Under the circumstances of this case, the District Court was well within its discretion in ordering the type of injunctive relief described in its decision.

III BECAUSE THE ISSUES ADDRESSED IN THE PETITION FOR CERTIORARI WERE NOT RAISED OR CONSIDERED BELOW, THEY ARE NOT PROPERLY BEFORE THIS COURT.

Issues concerning the standard for imposing liability on employers for sexual harassment and concerning the nature and scope of permissible injunctive relief under the circumstances of this case were not raised or argued below, nor were they considered by the Court of Appeals. Moreover, on appeal, Domino's expressly acknowledged

that the District Court had applied the proper legal standards.

On page 20 of its Initial Brief to the Eleventh Circuit, Domino's argued that the District Court "failed to review all of the evidence before it when *applying the required legal standards.*" [*Emphasis supplied*]. On page 22 of its Initial Brief, Domino's conceded that the "District Court *utilized the appropriate analysis*" as to the hostile working environment claim. [*Emphasis supplied*]. Instead, Domino's took issue with the District Court's interpretation of the facts and the evidence, contending, as to the hostile working environment claim, that Ms. Carrier's conduct was not sufficiently frequent, pervasive or severe and did not alter the conditions of Mr. Papa's employment. (Initial Brief, p. 31).

As to the *quid pro quo* claim, Domino's argued that the District court was clearly erroneous in determining that the EEOC and Mr. Papa had established a *prima facie* case. As to the retaliation claim, Domino's argued clear error as well, taking issue with the District Court's finding that the company's asserted reason for Mr. Papa's termination was pretextual. As to the relief awarded, Domino's quarreled with the District Court's award of back pay, not injunctive relief. (Initial Brief, pp. 46-49).

Having admitted that the District Court was correct in its legal analysis, and having made entirely different arguments below, Domino's cannot here raise for the first time inconsistent and novel grounds for reversal of the District Court's ruling. This Court has been very clear that "only in exceptional cases will this Court review a

question not raised in the court below." *Lawn v. United States*, 355 U.S. 339, 362-363 n.16 (1958).

Where issues were neither raised nor considered by the court of appeals, this Court will not ordinarily consider them. *Adickes v. Kress*, 398 U.S. 144, 147-148 n.2 (1970). The Court will decline to reach an argument not made in or addressed by the court of appeals. *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 759-761 n.6 (1984). *Brandon v. Holt*, 469 U.S. 464, 473 n.25 (1985).

The reluctance of this Court to consider issues not raised below is not absolute, but is a prudential rule. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (declining to hear claims not raised below). Where a party raises "not a new claim . . . but a new argument to support what has been his consistent claim . . . , we would ordinarily feel free to address it, since it was addressed by the court below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Supreme Court practice permits review of an issue not previously argued so long as it has been "passed upon" by the court of appeals. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

The issues which comprise the subject matter of Domino's Petition for *Certiorari* were neither addressed nor passed upon by the court below. Where Domino's made entirely different arguments in the Eleventh Circuit, it should not be permitted to raise new and contradictory arguments in this Court.

Finally, Domino's suggests that this Court should enter a "GVR" order, remanding this case to the Eleventh Circuit for reconsideration in light of *Faragher v. City of Boca Raton, supra*, but Domino's has shown no grounds

for this Court to enter such an order. As discussed previously, the instant case does not conflict with *Faragher.* The *Faragher* case was a pure hostile working environment case which the *Faragher* court distinguished from cases in which plaintiffs had alleged both hostile working environment and *quid pro quo* sexual harassment, such as this case.

Domino's cites two decisions of this Court as authorizing it to enter a "GVR" order, but fails to state how they apply to the case at bar.

In *Lords Landings Village Condominium Council of Unit Owners v. Continental Insurance Co.*, 117 S.Ct. 1731 (1997), this Court explained when it is proper to issue a "GVR" order, citing *Lawrence v. Chater*, 116 S. Ct. 611 (1996).

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.

Here, there is no reason to believe that the Eleventh Circuit did not fully consider any recent or intervening developments, including the *Faragher* opinion, and no probability that the decision on appeal rests on a premise the Eleventh Circuit would reject if given the opportunity for further consideration. That court *was* given the opportunity for further consideration when Domino's petitioned for rehearing *en banc*, and did not choose to

reconsider its summary affirmance of the District Court's decision in light of *Faragher.*

The second case cited by Domino's in support of its contention that the Supreme Court should issue a "GVR" order here also does not avail as it too is factually distinguishable from the instant case. In *Stutson v. United States,* 116 S.Ct. 600 (1996), a criminal case, the prevailing party below was the federal government, which had repudiated the legal position it advanced below, and the only opinion below did not consider the import of a recent Supreme Court precedent which both parties now agreed applied. This was truly a case where a "GVR" order was appropriate, but its circumstances differ greatly from those in the above-captioned case.

Here, the prevailing parties, one of which is the federal government, have not changed their positions, and there is no controlling precedent which the Eleventh Circuit did not consider in affirming the District Court.

Lawrence v. Chater, supra, lists a number of instances in which the Supreme Court will issue a "GVR" order: intervening Supreme Court decisions, state supreme court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, confessions of error or other positions newly taken by the Solicitor General and state attorneys general. But none are applicable here. Therefore, a "GVR" order would not be proper in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* filed by Domino's Pizza, Inc. should be denied, and attorney's fees and costs awarded to Mr. Papa for his response in opposition.

Respectfully submitted,

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No. 97-552

In the Supreme Court of the United States

OCTOBER TERM, 1997

DOMINO'S PIZZA, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND DAVID PAPA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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1788

QUESTIONS PRESENTED

1. Whether the district court applied the correct legal standard in determining that petitioner was liable for the hostile work environment created by one of its corporate area supervisors.

2. Whether the district court abused its discretion in ordering petitioner to refrain from further harassment and retaliation, to post notices of its existing harassment and retaliation policies, and to train its managers in those policies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 3a-17a) is reported at 909 F. Supp. 1529.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1997. A petition for rehearing was denied on July 3, 1997. Pet. App. 18a-20a. The petition for a writ of certiorari was filed on September 26, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Domino's Pizza employed respondent David Papa as the manager of one of its pizza stores. Pet. App. 4a. Beth Carrier, a corporate area supervisor, was Papa's supervisor. *Ibid.* After promoting Papa to store manager, Carrier repeatedly made unwelcome sexual advances to him. *Id.* at 4a-5a. When Carrier would visit Papa's store, she would rub his neck and back. *Ibid.* While standing beside Papa, Carrier would put her hand around Papa's waist. *Ibid.* At one business meeting, Carrier told Papa that he had a "nice ass" and that he should not bend over because it "turned her on." *Ibid.* When they were distributing coupons to local residents, Carrier again told Papa that he had a "nice ass." *Ibid.* At various times, Carrier told Papa that she was interested in starting a relationship with him, that she loved him and cared for him, and that if he started a relationship with her, he could become a supervisor. *Id.* at 4a-5a. On one visit to the store, Carrier moved close to Papa, put her arm around his back, and "reached down with her hand and she grabbed [his] behind and squeezed it." *Id.* at 5a. On another visit to the store, Carrier told Papa that her bra had snapped off and then asked whether that turned him on. *Ibid.*

Carrier's sexual advances embarrassed Papa and made him feel uncomfortable. Pet. App. 8a. Papa was so uncomfortable that he instructed one of the employees at his store to be present whenever Carrier visited. *Ibid.* Papa also repeatedly made it clear to Carrier that her sexual advances were unwelcome, and on one occasion explicitly instructed her not to touch him. *Id.* at 8a-9a. Carrier nonetheless persisted in her conduct. *Id.* at 8a. Ultimately, in

response to one of Carrier's statements that she loved him and wanted to live with him, Papa ordered her from his office and threatened to report her conduct to her supervisor. *Id.* at 5a. Upon leaving the store, Carrier threatened to "get" Papa. *Ibid.* Approximately six days later, Carrier came to the store with her superior and fired Papa. *Ibid.*

2. The Equal Employment Opportunity Commission (EEOC) filed suit against petitioner, alleging that petitioner had subjected Papa to discrimination on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 3a. Specifically, EEOC alleged that Papa had been subjected to a sexually hostile work environment, that he had been fired for rejecting Carrier's advances (quid pro quo harassment), and that he had been subjected to retaliation for threatening to report the harassment. *Ibid.* Papa intervened in the action. *Ibid.*

After a trial, the district court found in favor of the EEOC and Papa. Pet. App. 3a-17a. The court first found that Carrier had subjected Papa to a hostile working environment. It found that Carrier's repeated advances were unwelcome, and that her harassment of Papa was sufficiently severe and pervasive to alter the conditions of his employment. *Id.* at 8a-9a. The court then concluded that petitioner was liable for the hostile working environment created by Carrier. The court noted that, under circuit precedent, an employer can be liable for a hostile working environment created by a supervisor when (1) the employer knew or should have known about the harassment, or (2) the supervisor used delegated authority to effectuate the harassment. *Id.* at 9a-10a. The court found that petitioner did not have actual or

constructive knowledge of the hostile atmosphere created by Carrier. It concluded that petitioner was liable for Carrier's conduct in creating a hostile work environment, however, because Carrier had used authority delegated to her by petitioner when she fired Papa. *Id.* at 10a.

The court next found that Papa had been subjected to quid pro quo harassment. Pet. App. 10a-11a. The court held that quid pro quo harassment involves proof that the rejection of harassment is the "cause of a tangible job detriment." *Id.* at 11a. The court found that such a showing had been made in this case, since Papa's rejection of Carrier's harassment resulted in his termination. *Ibid.* The court concluded that petitioner was liable for Papa's quid pro quo harassment because petitioner had invested authority in Carrier to terminate Papa. *Id.* at 11a n.1.

Finally, the court found that Papa suffered unlawful retaliation for voicing his opposition to Carrier's sexual advances. Pet. App. 12a. The court found that the short period of time between Carrier's comment that she would "get" Papa and Carrier's firing of Papa "clearly proves a causal connection between the protected activity and the firing." *Ibid.*

The court awarded Papa $237,257.52 in back pay. Pet. App. 13a-15a. The court also permanently enjoined petitioner from sexually harassing or retaliating against employees, directed petitioner to post a written sexual harassment and retaliation policy in each of its stores for two years, and directed petitioner to conduct training of its managers concerning its sexual harassment and retaliations policies once a year for the next two years. *Id.* at 16a-17a.

3. The court of appeals affirmed without opinion. Pet. App. 1a-2a. The court of appeals also denied the

petition for rehearing and suggestion of rehearing en banc. *Id.* at 20a.

ARGUMENT

1. Petitioner contends (Pet. 6-15) that this Court should grant certiorari to resolve a conflict in the circuits concerning the standard for determining when an employer is liable for a hostile working environment created by one of its supervisors. This Court recently granted certiorari to resolve that issue in *Faragher* v. *City of Boca Raton*, cert. granted No. 97-282 (Nov. 14, 1997).

This case, however, need not be held pending the decision in *Faragher*. The district court in this case found petitioner liable not only for subjecting Papa to a hostile working environment, but also for quid pro quo harassment and for unlawful retaliation. Although the decision in *Faragher* could affect petitioner's liability for the creation of a hostile working environment, the findings of quid pro quo harassment and retaliation provide independent grounds for the judgment below that should not be affected by *Faragher*. Petitioner also waived its claim that the district court applied an incorrect legal standard in finding it liable for the creation of a hostile working environment by failing to assert it in a timely manner below. For those reasons, the petition in this case should be denied, without awaiting the decision in *Faragher*.

a. In *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 72 (1986), the Court held that courts should be guided by agency principles in deciding when an employer is liable for harassment committed by one of its supervisors. Since *Meritor Savings*, courts of appeals have divided on the circumstances in which

a supervisor can be viewed as an agent of the employer in creating a hostile work environment. Some courts have limited recovery to situations in which the employer knew or should have known about the harassment, while other courts have also permitted recovery when supervisors use their supervisory authority to effect the harassment. See Pet. 11-14 (discussing the cases). This Court granted certiorari in *Faragher* to resolve that conflict. See 97-282 Pet. at i ("Is an employer, pursuant to common-law principles of agency, responsible for hostile-environment sexual harassment committed by supervisory employees who use their supervisory status to effect the harassment?").

The petition in *Faragher*, however, does not raise any question concerning the circumstances in which an employer is liable when a supervisor engages in quid pro quo harassment, *i.e.*, when a supervisor uses an employee's submission to or rejection of unwelcome sexual conduct as the basis for employment decisions affecting the employee, such as promotions, pay raises, or terminations. See 29 C.F.R. 1604.11(a)(2) (defining quid pro quo harassment). Nor is there any division in the circuits on that distinct issue. Because supervisors are able to engage in quid pro quo harassment only by virtue of authority conferred by the employer to grant job benefits or detriments, the courts of appeals have uniformly concluded that an employer is vicariously liable for a supervisor's quid pro quo harassment, without respect to the employer's actual or constructive knowledge of the harassment. *Jansen* v. *Packaging Corporation of America*, 123 F.3d 490, 495 (7th Cir. 1997), petition for cert. pending, No. 97-569; *Davis* v. *City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols* v. *Frank*,

42 F.3d 503, 513-514 (9th Cir. 1994); *Bouton* v. *BMW of N. Am., Inc.*, 29 F.3d 103, 106-107 (3d Cir. 1994); *Karibian* v. *Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), cert. denied, 512 U.S. 1213 (1994); *Sauers* v. *Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman* v. *Allied Signal, Inc.*, 970 F.2d 178, 185-186 (6th Cir.), cert. denied, 506 U.S. 1041 (1992); *Steele* v. *Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). Petitioner appears to accept (Pet. 17) that solid wall of precedent as a correct statement of the law.

The district court's finding that petitioner was liable for quid pro quo harassment is consistent with that uniform understanding of the scope of employer liability for such harassment. The district court specifically found that petitioner's area supervisor had engaged in quid pro quo harassment when she fired Papa after he refused to submit to her advances, and that petitioner was liable for that harassment because it had delegated authority to its area supervisor to fire Papa. Pet. App. 11a & n.1. The decision in *Faragher* should not affect that distinct basis for imposing liability on petitioner in this case.

Although petitioner's questions presented do not specifically call into question the district court's finding of quid pro quo harassment, petitioner asserts in the body of its petition (Pet. 20-21) that there was no basis for a finding of quid pro quo harassment in this case. According to petitioner (*ibid.*), the district court erred in finding quid pro quo harassment because Carrier never informed Papa that his refusal to submit to her advances would result in a job detriment. In fact, however, the district court specifically found that, when Papa rejected Carrier's advances, Carrier told Papa that she would "get" him. Pet. App.

5a. In any event, a plaintiff can establish a claim of quid pro quo harassment when the rejection of a supervisor's advances results in a job detriment; there is no requirement that the supervisor threaten the employee with a job detriment beforehand. See *Farley* v. *American Cast Iron Pipe Co.*, 115 F.3d 1548, 1552 (11th Cir. 1997); *Henson* v. *City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982). Thus, the district court's findings make out a core case of quid pro quo harassment and provide an independent ground for its judgment awarding backpay. Petitioner's fact-bound challenge to those findings does not warrant review.

b. The district court also found petitioner liable for retaliation against Papa, Pet. App. 12a, and that retaliation finding provides another independent ground for the judgment awarding backpay. Petitioner's questions presented do not challenge the district court's finding of retaliation (see Pet. i), and the body of its petition refers to that finding only in a footnote, which argues that the finding is unsupported by the evidence. See Pet. 21 n.7. Even if it were appropriate to consider an argument not falling within the questions presented, petitioner's fact-bound challenge to the district court's retaliation finding would not warrant review. As the district court found, the short period of time between Carrier's comment that she would "get" Papa for voicing his opposition to her sexual advances and Carrier's firing of Papa "clearly proves a causal connection between the protected activity and the firing." Pet. App. 12a. The district court's finding of retaliation is therefore supported by the evidence and provides another independent ground for the backpay award that should not be affected by the decision in *Faragher*.

c. The petition in this case also should not be held pending the decision in *Faragher* because petitioner waived any claim that the district court used an erroneous legal standard in finding petitioner liable for the creation of a hostile work environment. Petitioner never argued to the Eleventh Circuit panel that the district court applied an incorrect legal standard in finding it liable for the creation of a hostile work environment. Petitioner argued only that the district court clearly erred in finding that Carrier's conduct was sufficiently severe and pervasive to create a hostile working environment. Because petitioner raised only a clear error challenge to the district court's finding, the court of appeals affirmed without an opinion. See Pet. App. 2a (Eleventh Circuit Rule 36-1 permits affirmance without opinion when the judgment of the district court is based on findings of fact that are not clearly erroneous). Petitioner made its employer liability argument in a petition for rehearing en banc. The Eleventh Circuit, however, does not consider questions raised for the first time in a petition for rehearing en banc absent "exceptional circumstances." See *United States* v. *Martinez*, 96 F.3d 473, 475 (1996), cert. denied, 117 S. Ct. 998 (1997). Consistent with that practice, the Eleventh Circuit did not seek a response to the petition, and it denied the petition without addressing the question presented.

This Court has stated that it "will not ordinarily consider" issues "neither raised before nor considered by the Court of Appeals." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Because petitioner did not properly raise below the issue of the correct standard for imposing liability on an employer for a hostile work environment created by a supervisor,

and because the court below did not consider it, that issue is not properly presented here.

Petitioner contends (Pet. 27) that, since it has always denied liability, it is free to make a new argument supporting that denial. Petitioner relies on the principle that "once a federal claim is properly presented, a party can make any new argument in support of the claim." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). That principle, however, is inapplicable here. The relevant claim in this case is that the district court applied the wrong legal standard in finding petitioner liable for the hostile work environment created by its area supervisor, and petitioner has never properly raised that claim before. A general denial of liability does not empower a defendant to raise new issues at every stage of the appellate process.

Petitioner alternatively contends (Pet. 28) that it should be excused for failing to raise the employer liability issue until its en banc petition, because the intervening decision in *Faragher* first brought that issue to light. Pet. 28. In fact, however, the Eleventh Circuit's decision in *Steele*, 867 F.2d at 1316, had indicated that an employer generally could not be liable for an abusive working environment created by a supervisor absent actual or constructive knowledge of the harassment. And, in any event, petitioner points to no Eleventh Circuit decision that had foreclosed the issue. Petitioner therefore had no legitimate excuse for failing to raise the issue with the panel.

2. Petitioner also contends (Pet. 22-27) that this Court should grant certiorari to decide whether the district court abused its discretion in awarding injunctive relief in this case. Petitioner, however, did not raise any objection to the district court's injunc-

tion before the Eleventh Circuit panel, and the panel did not address the issue. Petitioner raised the issue of the propriety of the injunctive relief for the first time in its petition for rehearing en banc, and, consistent with its ordinary practice, the court of appeals denied the petition without addressing that issue. Because petitioner did not properly raise the issue of the propriety of the injunctive order below and because the court of appeals did not consider it, that issue is not properly presented here.

Even if the issue were properly presented, review would not be warranted. The principles governing the award of injunctive relief are well established. A district court has "'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (quoting *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)). The district court sought to accomplish those goals. Its order does nothing more than enjoin further harassment, direct the petitioner to post notices of its harassment and retaliation policies, and direct petitioner to train its managers in those policies. Pet. App. 16a-17a.

Petitioner complains (Pet. 22-23) that the relief exceeds what is necessary to remedy the violation in this case. The district court heard evidence, however, that while petitioner had policies against harassment and retaliation, they were not effectively communicated. In particular, the court heard testimony from four employees that they had never seen the policies and from three employees that they had not been trained in them. I Tr. 54-55; II Tr. 169; Stout Dep. 78; Cerniglia Dep. 104, 115; Contois Dep. 67-69. At least

one witness other than Papa testified that he had no idea to whom he should complain if he were subjected to harassment. Cerniglia Dep. 108. Moreover, as a plaintiff in this action, the EEOC had authority to seek relief that would not only redress the discrimination to Papa but that would also "vindicate the public interest in preventing employment discrimination." *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980).

Even if the relief were more extensive than necessary, the issue would not warrant this Court's attention. Requiring an employer to comply with the law, and to effectively communicate its own policies is a limited imposition. And because the scope of relief was not contested in the court of appeals and there is accordingly no decision below addressing the propriety of the relief, the relief affects only the parties to this case and does not raise any issue of general importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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